No. 03-1543

In The
Supreme Court of the United States

RICHARD R. RICHARD, JR.,
on behalf of himself and all others similarly situated,

Petitioners,

v.

HOECHST CELANESE CHEMICAL GROUP, INC., SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, HOECHST CELANESE CORPORATION, and E.I. DuPONT de NEMOURS AND COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SHELL OIL COMPANY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit properly affirmed the dismissal of Petitioner's due process claim for lack of subject matter jurisdiction when ruling in his favor would have required the district court to review the final decisions of two state courts and determine their judgments were wrong in violation of the *Rooker-Feldman* doctrine.

2. Whether the Fifth Circuit properly affirmed the dismissal of Petitioner's civil RICO action for failure to state a claim upon which relief can be granted.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners have identified all parties in this proceeding.

Pursuant to Supreme Court Rule 29.6, Respondent Shell Oil Company advises the Court that Shell Oil Company is a wholly-owned subsidiary of Shell Petroleum, Inc., a Delaware corporation. Shell Petroleum, Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum Company and 40% by The "Shell" Transport and Trading Company, p.l.c.

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EXPLANATION OF RECORD CITES

"Pet." refers to the Petition for Writ of Certiorari.

"Pet. App. _____" refers to the Appendix attached to the Petition for Writ of Certiorari.

"Shell App. _____" refers to the Appendix attached to Respondent Shell Oil Company's Brief in Opposition to Writ of Certiorari.

"_____ R. ____" refers to the Record on Appeal filed with the United States Court of Appeals for the Fifth Circuit cited by specific volume and page number.

"Supp. R. ____" refers to the Supplemental Record on Appeal filed with the United States Court of Appeals for the Fifth Circuit cited by specific docket and exhibit number.

SHELL OIL COMPANY'S BRIEF IN OPPOSITION

This case represents yet another failed attempt to make a federal case out of leaking plumbing. In *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001), the Fifth Circuit rejected an effort to turn "garden variety" state law products liability claims into a federal racketeering case, and this Court denied the petition for writ of certiorari. The Fifth Circuit held that a plaintiff similarly situated to Petitioner could not meet RICO's proximate cause requirement because he did not personally receive or rely upon the alleged misrepresentations made the basis of his mail and wire fraud claims.

Petitioner argues that a different result should obtain here because he says he sought equitable relief under RICO in the form of disgorgement of profits rather than damages. He did not. Petitioner also claims that he was entitled to seek equitable disgorgement in a RICO civil action even though he too could not meet the detrimental reliance requirement for a damage claim. He cannot. The district court rejected Petitioner's RICO contentions, and the Fifth Circuit affirmed. They were correct.

However, Petitioner's case *was* in fact different from *Summit* in one significant way: regardless of the merits of his RICO arguments, Petitioner's claims were precluded by the 1995 final judgments of Tennessee (*Cox*) and Alabama (*Spencer*) courts approving two nationwide class action settlements.[1] Anticipating this, Petitioner also

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[1] Final Judgment in *Cox v. Shell Oil Co.*, Case No. 18,844 (Chancery Ct., Obion Cty., Tenn. Nov. 17, 1995) (Shell App. 30-34) and Final Order Approving the Class Action Settlement, Attorneys' Fees and

(Continued on following page)

sought to set aside the *Cox* and *Spencer* settlements on the ground that absent class members were not afforded adequate notice or adequate representation. However, Petitioner's efforts to have the federal district court void the final judgments of the Tennessee and Alabama courts ran afoul of the *Rooker-Feldman* doctrine.[2]

Contrary to Petitioner's contentions, the courts below followed well-established precedents in dismissing Petitioner's RICO claims for failure to state a claim upon which relief could be granted and dismissing Petitioner's collateral attacks on the *Cox* and *Spencer* judgments for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine. As a result, this case does not require this Court's review.

Expenses, and Awards to Representative Plaintiffs in *Cox* (filed Nov. 17, 1995) (Shell App. 1-29) (collectively "*Cox*"); *Spencer v. Shell Oil Co.*, Case No. CV-94-047 (Circuit Ct., Greene Cty., Ala. Nov. 17, 1995) (3 R. 852-857) ("*Spencer*"). Contrary to Petitioner's claim, Respondents did not cause these cases to be brought. (Pet. 5-6).

[2] Under the *Rooker-Feldman* doctrine, a federal district court lacks jurisdiction to review, modify, nullify, or otherwise engage in appellate-style review of a state court's judgment. Rather, review of any constitutional challenges to a state court's judgment must be through the state's appellate system and ultimately in the United States Supreme Court. *See* § I.A. *infra*. The doctrine derives from the Supreme Court's decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476-82 (1983).

STATEMENT OF THE CASE

A. Factual Background

Petitioner[3] is the owner of a used mobile home with polybutylene ("PB") plumbing. PB plumbing systems are comprised of PB pipe and various "fittings" that join sections of the pipe. These fittings are made from different raw materials and different designs. Respondents did not manufacture or sell PB plumbing systems or the component parts of those systems. Rather, Shell manufactured PB resin that was sold to third parties who extruded it into PB plumbing pipes, and Celanese and DuPont manufactured and sold acetal resins named Celcon and Delrin, respectively, which were molded into the plastic fittings used to join the pipes together.[4]

In 1995 Shell and Celanese entered into a settlement with a nationwide class of owners of structures with PB plumbing. The *Cox* settlement, approved by a state court in Tennessee, obligates Shell and Celanese to provide $950 million to pay for replumbs[5] for claimants with a qualifying plumbing leak and for the repair of physical damage to property resulting from a leak. (Supp. R. Docket No. 185, Ex. 84 at 10, § 4.5, and Third Amendment at 3, § 2.2). DuPont entered into a separate settlement with a similar

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[3] Because Petitioner's Statement of the Case is simply a self-serving recitation of his allegations, replete with misstatements and mischaracterizations of fact and law, Shell respectfully presents its own Statement of the Case.

[4] Petitioner did not sue any of the manufacturers of the pipe and fittings installed in his mobile home, the manufacturer of his mobile home, or the previous owner who Petitioner claims misrepresented to him the condition and quality of the plumbing in his mobile home.

[5] A "replumb" is the replacement of a class member's leaking PB plumbing system with a new copper or CPVC plumbing system.

nationwide class of homeowners with PB plumbing. Its *Spencer* settlement, approved by a court in Alabama, obligates DuPont to contribute further sums toward the replacement of PB plumbing systems and the repair of associated property damage.

By purchasing a mobile home containing PB plumbing, Petitioner became a member of the *Cox* and *Spencer* nationwide settlement classes. He did not timely exercise his right to opt out. Assuming he otherwise met the eligibility requirements of the settlement, he was entitled to have the PB plumbing in his mobile home replaced free of charge with a copper or CPVC plumbing system and any water damage to his home repaired. Petitioner does not allege any circumstances peculiar to him that would make this anything less than a complete remedy for the harm he claims to have sustained. Nevertheless, Petitioner chose to forego that full and effective relief. Instead he sought to set aside the final judgments of the Tennessee and Alabama courts approving the *Cox* and *Spencer* settlements and litigate on behalf of a new putative class the product liability claims settled in those prior class actions.

B. Procedural Background

In his Original Class Action Complaint filed in January 2000, Petitioner alleged that Respondents were liable for the damages he and the class sustained as a result of leaks in their PB plumbing systems on theories of conspiracy, strict liability, negligence, and breach of implied warranties. In addition, he alleged that the Tennessee and Alabama judgments approving the *Cox* and *Spencer* nationwide class action settlements should not be given full faith and credit and thereby preclude his lawsuit

because those courts allegedly failed to provide absent class members with due process. (1 R. 1-25).

Petitioner's Original Class Action Complaint was insufficient to invoke the district court's subject matter jurisdiction. His claims for relief arose strictly under state law, and there was no diversity of citizenship. His due process attack on the *Cox* and *Spencer* settlements did not create federal subject matter jurisdiction because of the well-pleaded complaint rule[6] and the *Rooker-Feldman* doctrine. In response to Respondents' motions to dismiss, Petitioner tried to manufacture federal subject matter jurisdiction by amending his complaint to add Lanham Act and RICO claims. (Shell App. 52-66). He also transformed his due process challenge to the *Cox* and *Spencer* judgments into a "claim for relief" and sought an injunction barring Respondents' use of the *Cox* and *Spencer* judgments to prevent his recovering damages attributable to his leaking plumbing. (Shell App. 66-74).

Petitioner's Lanham Act claim was patently frivolous. Section 43(a) of the Lanham Act addresses only *competitive* injuries and a consumer such as Petitioner lacks standing to assert a claim. *E.g., Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1383 (5th Cir. 1996). Petitioner eventually recognized the futility of his Lanham Act claim and "withdrew" it. (3 R. 979).

Petitioner's RICO claim was foreclosed by the Fifth Circuit's decision in *Summit*, in which the Fifth Circuit

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[6] Under the well-pleaded complaint rule, a plaintiff cannot establish federal question jurisdiction by pleading a federal ground in avoidance of an anticipated defense. *See* footnote 12 *infra*. Although not relied on by the Fifth Circuit, the well-pleaded complaint rule provided an alternative basis for affirming the dismissal of Petitioner's due process claim.

held that the owner of a structure with PB plumbing could not maintain a RICO claim against these same Respondents unless he could show he personally received and relied upon the alleged misrepresentations made the basis of his RICO mail and wire fraud claims. To avoid the conclusive effect of *Summit*, Petitioner first argued that his case was different because, unlike the *Summit* plaintiffs, he had pled reliance. (3 R. 990). However, when the district court ordered him to file a RICO Case Statement detailing the factual bases for his RICO claim, he was forced to admit that he too never personally received, heard, saw, or relied on any alleged misrepresentation by any of the Respondents, which brought his case squarely within the rule of *Summit*. (2 R. 664-65).

Faced with this dilemma, Petitioner then sought refuge in the narrow "target exception" to the civil RICO requirement of detrimental reliance. (3 R. 991). However, this argument was foreclosed not only by *Summit*, but also by the Fifth Circuit's subsequent decision in *Proctor & Gamble Co. v. Amway*, 242 F.3d 539 (5th Cir.), *cert. denied*, 534 U.S. 945 (2001). In both *Summit* and *Proctor & Gamble* the Fifth Circuit made clear that RICO's "narrow target exception" applies only to injured competitors who can establish that their customers were lured away because they relied on a defendant's fraudulent misrepresentations. *See Proctor & Gamble*, 242 F.3d at 564-65. Consequently, the district court rejected Petitioner's "target exception" argument. (Pet. App. 46-48). In his Fifth Circuit brief Petitioner finally admitted that *Summit* prevented him from obtaining a RICO damage recovery.

In a last-ditch effort to salvage a RICO claim, Petitioner raised orally at a hearing in the district court a new argument – that under the Seventh Circuit's decision in

National Org. for Women, Inc. v. Scheidler ("*NOW*"), 267 F.3d 687 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003), he could maintain a RICO claim for *equitable relief* in the form of disgorgement of profits. (6 R. 16-18). After receiving briefs on Petitioner's new argument, the district court rejected it for two reasons. First, the district court held that "Plaintiff's foundational claim that equitable relief is permissible under RICO is tenuous at best," since "[t]o the extent that courts in the Fifth Circuit have considered equitable remedies under RICO, the idea has been dismissed." (Pet. App. 51-52). Second, the district court held that the *NOW* case did not change *Summit*'s requirement that a civil RICO plaintiff must demonstrate direct reliance on a fraudulent misrepresentation, which Petitioner could not do. (Pet. App. 52). As a result, the district court held that Petitioner's RICO allegations failed to state a claim upon which relief could be granted. (Pet. App. 52).

In addition, the district court held that under the *Rooker-Feldman* doctrine it lacked jurisdiction over Petitioner's due process challenge to the *Cox* and *Spencer* judgments. (Pet. App. 33-35). Having dismissed Petitioner's purported federal law claims, the district court then dismissed without prejudice his pending state law claims. (4 R. 1312).

In December 2003, the Fifth Circuit affirmed the district court's dismissal of Petitioner's claims. *Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345 (5th Cir. 2003) (Pet. App. 1-18). Although the Fifth Circuit could have reached that result on any number of grounds, ultimately it chose two. First, the court affirmed the dismissal of Petitioner's due process challenge to the *Cox* and *Spencer* judgments based on the district court's lack of

subject matter jurisdiction under *Rooker-Feldman*. Second, the Fifth Circuit held that the district court had properly dismissed Petitioner's RICO claim for failure to state a claim because it found the remedy Petitioner claimed to be seeking – equitable disgorgement – was not available under the circumstances of this case. (Pet. App. 18).

REASONS THE PETITION SHOULD BE DENIED

I. The Fifth Circuit Correctly Held That Under the *Rooker-Feldman* Doctrine the District Court Lacked Subject Matter Jurisdiction Over Petitioner's Due Process Claim

The Fifth Circuit correctly found that the *Rooker-Feldman* doctrine deprived the district court of subject matter jurisdiction over Petitioner's due process claim.

A. The *Rooker-Feldman* Doctrine Prohibited the District Court From Reviewing the *Cox* and *Spencer* Final Judgments

The *Rooker-Feldman* doctrine derives from this Court's holdings in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In *Rooker*, this Court held that federal district courts cannot exercise "appellate jurisdiction" over constitutional questions decided by state courts, even if the state court judgment was in error. *Rooker*, 263 U.S. at 415. In such instances, the appropriate remedy is through the state appellate system. *Id.* Recourse in the federal courts is limited strictly to seeking review in the United States Supreme Court since all lower federal courts lack subject matter jurisdiction to review or modify state court judgments. *Id.* at 416. In *Feldman*, this Court

explained that the lower federal courts also lack jurisdiction to review final judgments of state courts when constitutional claims are "inextricably intertwined" with the challenged state court judgment. *Feldman*, 460 U.S. at 483 n.16.

Here Petitioner sought to have the federal district court decide issues "inextricably intertwined" with the final judgment of the Tennessee court approving the *Cox* settlement. He argued that the Tennessee judgment was not entitled to full faith and credit because absent class members were not afforded the due process – adequate notice and adequate representation – that *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811-12 (1985), requires. (Pet. 11-12).

However, in approving the *Cox* settlement, the Tennessee court expressly addressed the *Shutts* due process requirements – and, indeed, many of Petitioner's specific complaints. For example, in his Second Amended Complaint Petitioner complained about the adequacy of class counsel's representation. (Shell App. 71-74, ¶¶ 123-128). The *Cox* court, however, found that "[t]here is no factual basis for the asserted objection that there is any conflict of interest with respect to the *Cox* Class Counsel." (Shell App. 23, ¶ 64). The *Cox* court further found that "[t]he *Cox* Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case." (Shell App. 23, ¶ 65). Finally, the *Cox* court found that the settlement was "in all respects fair, reasonable, and adequate and in the best interests of the Settlement Class." (Shell App. 18, ¶ 38; Shell App. 27, ¶ 7).

In addition, Petitioner alleged that the notice provided to absent class members in *Cox* was constitutionally inadequate. (Shell App. 68, ¶ 113; Shell App. 69, ¶ 117; Shell App. 74, ¶ 129). However, the *Cox* court's Final Order also reveals the careful attention it paid to the issue of notice to absent class members. After reviewing the details of the multi-faceted, multi-media notice campaign and considering the testimony of experienced class notice experts, the *Cox* court ruled that the notice campaign "as designed and implemented, met and exceeded the requirements of the United States Supreme Court, Tennessee's Rule 23, due process and the Constitution, as construed in [*Shutts*]." (Shell App. 17, ¶ 32). The *Cox* court further found that "the notice program is one of the most comprehensive class notice campaigns ever undertaken," that "all reasonable efforts have been made to reach affected consumers," and that "the best notice practicable under the circumstances has been provided to the settlement class."[7] (Shell App. 6; Shell App. 17, ¶ 33).

Moreover, the *Cox* court found that "[t]he notice provided to the Settlement Class was neither misleading nor defective." (Shell App. 21, ¶ 50). Rather, the *Cox* court found that the notice "fully and accurately informed Settlement Class members of all material elements of the proposed Settlement" and complied with all applicable legal standards. (Shell App. 3; Shell App. 17, ¶¶ 32, 33).

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[7] In reaching its conclusion the *Cox* court noted that the *Cox* settlement provided for not only an initial notice campaign, but also re-noticing the class every three years thereafter until 2009. (Shell App. 11, ¶ 12(e)). The *Cox* settlement further provided an opportunity for subsequent purchasers of homes with PB plumbing – such as Petitioner – to opt out of the settlement in response to the subsequent notice. (Supp. R. Docket No. 185, Ex. 84 at § 10.2).

Petitioner disputes all of these material findings of the Tennessee court and sought to have the federal district court declare that the *Cox* court was wrong in its conclusion that the due process requirements of *Shutts* were met. However, as the Fifth Circuit held, Petitioner's claims collided head-first with the *Rooker-Feldman* doctrine, which bars exactly this type of appellate review of state court judgments:

> [Petitioner's] allegations indisputably denounce the express findings of the *Cox* state court. . . . The *Feldman* holding appears to squarely fit [Petitioner's] situation. The *Cox* court's findings that allow for certification are "inextricably intertwined" with [Petitioner's] constitutional challenge to the state's compliance with due process requirements. A federal court cannot examine the due process deficiencies in *Cox* without disturbing the underlying judgment.

(Pet. App. 10-11). In short, the Fifth Circuit's holding that the federal district court lacked subject matter jurisdiction over Petitioner's due process challenge to the *Cox* final judgment is an unexceptional application of *Rooker-Feldman*.[8] Accepting the formulation of Justice Marshall

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[8] Although it could have stopped there, the Fifth Circuit went on to find that Petitioner had failed to state a claim under § 1983. (Pet. App. 11-15). Respondents Hoechst Celanese and DuPont have fully addressed this issue in their Briefs in Opposition. Shell would add only that Petitioner never pleaded the § 1983 claim he hypothesizes. (Pet. 7). Plaintiff's Second Amended Complaint does not reference § 1983 at all. It contains no allegations of any facts supporting state action under either the "innocent agent" or "judicial malfeasance (bribery)" theory. To the contrary, Petitioner based his due process claim on, first, an obscure "door closing" theory applicable only to South Carolina state courts, and, second, supposed deficiencies in the *Cox* court's findings with respect to due process. (Shell App. 66-74, ¶¶ 105-129).

in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987), the circuit courts universally hold that when the federal district court can provide relief only by determining that the state court was wrong, then plaintiff's case is, in effect, an appeal of the state court decision prohibited by the *Rooker-Feldman* doctrine. *See, e.g.*, *Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 393 (6th Cir. 2002); *Ace Const. v. City of St. Louis*, 263 F.3d 831, 833 (8th Cir. 2001); *Doe & Assoc. Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001).

B. There Is No Exception to the *Rooker-Feldman* Doctrine For Absent Class Members Who Collaterally Attack State Court Class Action Judgments

Petitioner offers a grab bag of arguments about how the Fifth Circuit's application of *Rooker-Feldman* supposedly conflicts with other circuits. Taken together, these arguments amount to a claim that there is an exception to *Rooker-Feldman* for absent class members who collaterally attack state court class judgments. In fact, there is no such exception, and no circuit court has so held. As Shell will demonstrate below, Petitioner's claim of a circuit conflict is based not on class action cases, but solely on a motley collection of divorce cases – and a misreading of those cases to boot.

1. There Is No Procedural Due Process Exception to the *Rooker-Feldman* Doctrine

Petitioner argues for a procedural due process exception to the *Rooker-Feldman* doctrine in which every absent class member is entitled to endlessly relitigate in federal

district court the rendering state court's findings with respect to the *Shutts* due process requirements. (Pet. 11-13). Notably, Petitioner cannot – and does not – cite any authority endorsing such an extreme proposition. *Rooker-Feldman* applies with equal force to both the procedural and substantive findings of state courts. The fact that a plaintiff affirmatively alleges he was not afforded procedural due process in a state court class action makes no difference in the *Rooker-Feldman* analysis.

The authority Petitioner cites for this argument is the decision in *Catz v. Chalker*, 142 F.3d 279 (6th Cir. 1998), one of at least five different lawsuits between parties to a divorce. Petitioner claims that in *Catz*, the "Ninth Circuit"[9] distinguished between "plaintiffs seeking to set aside state judgments because of their substance from those challenging the state court's procedure." (Pet. 15). According to Petitioner, "when a plaintiff challenges procedure rather than merits, his claim is . . . not precluded by *Rooker-Feldman*." (Pet. 15-16). Petitioner's reliance on *Catz*, however, is utterly misguided.

In *Catz* the Sixth Circuit held simply that certain due process allegations were not "inextricably intertwined" with the merits of a state court divorce decree such that *Rooker-Feldman* did not apply. 142 F.3d at 294-95. *Catz* bears no resemblance to the situation here. In *Cox* the Tennessee court made specific findings pertaining to the adequacy of notice and the adequacy of representation. Indeed, Tennessee Rule of Civil Procedure 23 required that it do so before approving the class settlement. Petitioner seeks to relitigate those same findings. Here then is the classic situation where "federal relief

[9] *Catz* is actually a Sixth Circuit decision.

can only be predicated upon a conviction that the state court was wrong," which even *Catz* recognized would be barred by the *Rooker-Feldman* doctrine. *Id.*

In fact, contrary to Petitioner's claim, the circuits uniformly reject the notion of a procedural due process exception to *Rooker-Feldman* in a class action context. For example, in *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997), the Seventh Circuit rejected plaintiffs' "far-reaching proposed exception to the *Rooker-Feldman* doctrine" when urged to conclude that it could "overturn the decision of the Alabama court insofar as it involved a determination that procedural due process was complied with." *Kamilewicz*, 92 F.3d at 510. Similarly, in *Snider v. City of Excelsior Springs*, 154 F.3d 809, 812 (8th Cir. 1998), the Eighth Circuit reiterated: "As we have held before in a case in which the plaintiffs alleged insufficient notice in a state court action, there is no procedural due process exception to the *Rooker-Feldman* rule."

The Fifth Circuit has similarly refused to recognize an exception to *Rooker-Feldman* for procedural due process claims. In *Liedtke v. State Bar of Texas*, 18 F.3d 315 (5th Cir.), *cert. denied*, 513 U.S. 906 (1994), an attorney sued in federal court to prevent the enforcement of a state court judgment disbarring him, claiming he had not been afforded due process or a full and fair opportunity to be heard. The court, however, applied *Rooker-Feldman* and affirmed dismissal of the attorney's action, noting that "the casting of a complaint in the form of a civil rights action cannot circumvent this rule." *Id.* at 317-18.[10]

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[10] Petitioner also claims the Fifth Circuit's decision below conflicts with cases like *Simes v. Huckabee*, 354 F.3d 823 (8th Cir. 2003), that

(Continued on following page)

2. There Is No Exception to the *Rooker-Feldman* Doctrine For Absent Class Members Who Were Not Named Parties to a State Court Judgment

Petitioner also contends that *Rooker-Feldman* cannot bar his due process attack on the *Cox* and *Spencer* judgments because he was not a "party" to those cases. (Pet. 15-17). In effect, he argues there is an exception to *Rooker-Feldman* for absent class members who are not named parties to the lawsuit. Under this theory absent class members would always litigate anew their various due process challenges to state court class action judgments. Petitioner's argument is wrong both legally and conceptually because it ignores the fundamental notion that a class action is a representative lawsuit.

For example, in *Snider*, the Eighth Circuit specifically rejected the argument that *Rooker-Feldman* did not apply to absent members of a state court-approved class because they were not "parties." The court stated that "to determine that the plaintiffs here were not 'parties' in the state court action would require us to hold that the state court wrongly certified the class," which is not an issue a federal

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refuse to apply *Rooker-Feldman* where the plaintiff has not had a "reasonable opportunity" to raise his federal claims in state court. (Pet. 16). For example, in *Simes* plaintiff attempted to raise his federal claims in state court, but the state court declined to consider them. *Id.* at 828-30. In other of the "reasonable opportunity" cases cited in *Simes*, the state court procedures themselves did not allow the plaintiffs to present their federal claims. All of these cases are inapposite here. In *Cox*, the Tennessee state court afforded absent class members the opportunity to object to the settlement and specifically considered objections to the adequacy of the notice and adequacy of representation similar to those that Petitioner urges. (Shell App. 19-23, ¶¶ 41, 42, 46, 47, 64, 66). Thus in *Cox* there was no lack of "reasonable opportunity" to contest these due process issues.

district court has jurisdiction to decide under the *Rooker-Feldman* doctrine. *Snider*, 154 F.3d at 812.

Other courts have also ruled that *Rooker-Feldman* precludes absent class members from obtaining review of final state court judgments in federal district court. In *Kamilewicz*, absent class members sued the parties to a nationwide class settlement and class counsel alleging, like Petitioner here, that the state court judgment approving the settlement was null and void because of lack of due process. *Kamilewicz*, 92 F.3d at 509. Notwithstanding that the plaintiff class members were not named parties to the original state court case, the Seventh Circuit held *Rooker-Feldman* barred the district court from hearing their due process claims. *Id.* at 509-12. Similarly, in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133 (3rd Cir. 1998), the Third Circuit held that under *Rooker-Feldman* absent class members could not sue in federal court to enjoin a Louisiana state court judgment approving a nationwide class settlement. *GMC*, 134 F.3d at 143.[11]

In fact, Petitioner's entire argument runs counter to the very representational nature of a class action. The Supreme Court long ago noted that a class action, or a "representative" suit, is an exception to the rule that one cannot be bound by a judgment *in personam* unless one was made fully a party in the traditional sense. *Shutts*, 472 U.S. at 808 (citing *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940)); *see also* 7B Wright, Miller, & Kane, *Federal*

[11] Petitioner's citation to *Allen v. Allen*, 48 F.3d 259 (7th Cir. 1995), a child custody case, is irrelevant because *Allen* does not involve or address a court's ability to bind absent class members to a *class action* judgment.

Practice and Procedure § 1789 at 238 (2d ed. 1986). There is no requirement that a class member must be a named party in a class action to be bound by the resulting judgment. The whole point of the *Shutts* minimum due process requirements – as set forth by this Court – is to establish when a class member will be bound *even though he does not appear and is not a named party*.

3. The Theory of Injury By an Adverse Party Does Not Apply Here

In a final twist, Petitioner argues that *Rooker-Feldman* does not apply when a plaintiff alleges his injury was caused by an adverse party. (Pet. 13-14). Petitioner contends that because he alleges damage to his mobile home caused by PB plumbing, "*Rooker-Feldman* does not bar jurisdiction, as it would if the legal injury were caused by the state judgment itself." (Pet. 14). Petitioner's characterization of his claim, however, is demonstrably false, and his reliance on *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003), is misplaced.

First, Petitioner's claim that he is "not seeking to invalidate the state court judgment" (Pet. 15) is disingenuous at best. Petitioner's Second Amended Complaint alleged that the *Cox* and *Spencer* judgments were void and sought an injunction barring the use of the *Cox* and *Spencer* judgments to preclude the product liability claims of Petitioner and the nationwide class he purported to represent. (Shell App. 69, ¶ 118; Shell App. 74, ¶ 129). His pleading included an eight-page attack on the validity of the *Cox* and *Spencer* judgments. (Shell App. 66-74). As the Fifth Circuit found, his "allegations indisputably denounce the express findings of the *Cox* state court." (Pet. App. 10).

Even the *Noel* court would regard such claims as barred by *Rooker-Feldman*. In that case the Ninth Circuit summarized this Court's decisions in *Rooker* and *Feldman* and its own precedents as follows:

> It is a forbidden *de facto* appeal under *Rooker-Feldman* when the plaintiff in federal district court complains of a legal wrong allegedly committed by the state court, and seeks relief from the judgment of that court.

341 F.3d at 1163. The *Noel* court subsequently reiterated,

> If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal district court.

Id. at 1164. That is of course precisely the situation here.

Second, when the *Noel* court contrasted the situation where the plaintiff complains of an injury caused by an adverse party, it was addressing an entirely different circumstance. In *Noel*, the federal district court mistakenly invoked *Rooker-Feldman* to dismiss a fiduciary duty claim simply because an identical claim was pending between the same parties in a simultaneous state court action. *Noel*, 341 F.3d at 1165. On appeal, the Ninth Circuit found that the district court had erred and *Rooker-Feldman* could not apply because there was *no state court judgment whatsoever* relating to the fiduciary duty claim – in fact, the state court litigation was still pending:

> We have never held that when there are simultaneous suits in state and federal court, in which related . . . claims are being litigated, the federal suit must be dismissed under *Rooker Feldman*. . . . The Supreme Court has repeatedly stated that simultaneous state and federal

> litigation of overlapping, and even identical, issues is an important feature of our federal system. . . . The pending suit in [state court] therefore does not prevent [plaintiff] from pursuing his fiduciary duty claim simultaneously in his federal court suit, and we reverse the district court's dismissal of that claim.

Id.

In summary, Petitioner has failed to identify any exception to the *Rooker-Feldman* doctrine that would alter the Fifth Circuit's conclusion that the federal district court lacked subject matter jurisdiction over Petitioner's due process claim.[12]

II. The Fifth Circuit Correctly Affirmed the Dismissal of Petitioner's RICO Claim For Failure To State a Claim on Which Relief Can Be Granted

Petitioner also seeks review of the Fifth Circuit's decision upholding the dismissal of his RICO claim. Petitioner claims this issue is worthy of this Court's review because, in his view, the Fifth Circuit construed too narrowly the disgorgement remedy of 18 U.S.C. § 1964(a).

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[12] Moreover, even if *Rooker-Feldman* were not dispositive of Petitioner's due process claim, the well-pleaded complaint rule provided an independent basis for the district court to find that the claim was barred. As Shell demonstrated in the courts below, Petitioner's due process attack on the judgment of the Tennessee court – asserting that the *Cox* judgment should not be enforced for due process reasons – merely anticipated the full faith and credit defense that Respondents were likely to raise. Under the well-pleaded complaint rule, matters raised in avoidance or anticipation of a defense do not present a federal question and cannot establish federal subject matter jurisdiction. *E.g.*, *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 (1983).

However, granting *certiorari* to decide this issue would be largely futile, as there were numerous other grounds on which Petitioner's RICO claim should have been dismissed. Thus this Court would likely never even reach the issue of the proper scope of the disgorgement remedy.[13]

Among the numerous flaws in Petitioner's RICO claims were the following:

- As the Fifth Circuit previously held in *Summit*, Petitioner could not sue for damages for mail or wire fraud because, by his own admission, he did not directly receive or rely upon Respondents' allegedly fraudulent statements;
- While Petitioner claimed he could nevertheless sue for equitable relief, he never sought to amend his complaint to allege a RICO claim for equitable relief;
- Even if he had pleaded a claim for equitable relief, that claim would still be barred by his admitted inability to meet the detrimental reliance requirement for a civil RICO fraud action;

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[13] It is well established that this Court "reviews judgments, not opinions." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The Court has repeatedly stated that the prevailing party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) (quoting *Washington v. Yakima Indian Nation*, 439 U.S. 463, 479 n.20 (1979)); *Bennett v. Spear*, 520 U.S. 154, 166 (1997) ("a Respondent is entitled, however, to defend the judgment on any ground supported by the record"); *Whitley v. Albers*, 475 U.S. 312, 326 (1986) (any ground properly raised below may be urged as a basis for Supreme Court's affirmance of Court of Appeals' decision). Therefore, even if this Court had some question about the Fifth Circuit's reasoning, it could not reverse the judgment of the Court of Appeals until it considered all of the grounds urged below and found that the judgment was not sustainable on any basis.

- In any event, the weight of authority holds that RICO does not authorize private plaintiffs to sue for equitable relief;
- The equitable relief Petitioner suggests but never pleaded – disgorgement – is a remedy available only to the Government;
- And, finally, the point on which the Fifth Circuit chose to rest its decision: disgorgement is available only to "prevent and restrain" ongoing or future violations and not, as here, to compensate for past injuries. (Pet. App. 16-17).

Any of the foregoing would provide an independent basis for affirming the dismissal of Petitioner's RICO claims.

A. The Equitable Remedy of Disgorgement Is Not Available to Petitioner

As discussed *infra* (§§ II. C. and D), equitable remedies are not available to private RICO plaintiffs, and Petitioner did not sue for equitable relief. But even if he had, disgorgement is a remedy that courts have allowed under RICO only in favor of the Government and, even in the case of the Government, it is allowed only under very limited circumstances not applicable here.

Both courts and commentators have uniformly recognized that "disgorgement is an equitable remedy available to the *government* in a civil RICO action" in appropriate cases. Smith and Reed, *Civil RICO*, § 10.02 (Matthew Bender 2000) (emphasis added). No case has ever held that disgorgement is available to a private civil RICO plaintiff and, noticeably, Petitioner cites none.

In fact, the Second Circuit – the only court of appeals to consider whether disgorgement is an appropriate civil RICO remedy – has restricted even the Government's use

of the remedy solely to situations aimed at preventing *future* RICO violations. In the seminal case of *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995), *cert. denied*, 516 U.S. 1122 (1996), the court rejected the idea that § 1964(a) authorized "disgorgement of gains ill-gotten long in the past." 52 F.3d at 1181. The court reasoned that § 1964(a) is "forward looking, and calculated to prevent RICO violations in the future." *Id.* Therefore, the court held, the only disgorgements available to the Government were those "designed to 'prevent and restrain' *future* conduct rather than to punish *past* conduct." *Id.* at 1182 (emphasis in original).[14]

As Petitioner conceded in his Second Amended Complaint, PB plumbing systems are no longer being sold. (Shell App. 39, ¶ 14). Thus, the Fifth Circuit reasoned, consistent with *Carson*, that even if disgorgement were a remedy available to Petitioner, disgorgement would not be available to Petitioner because he did not seek disgorgement to prevent or restrain ongoing or future injury, but rather solely for the purpose of compensation for past injuries:

> Even if equitable relief were available to a private party, disgorgement is not a proper remedy given the circumstances of this case. . . . We agree with the Second Circuit's reasoning in *Carson*. Section 1964(a) establishes that equitable remedies are available only to prevent ongoing and future conduct. Here, [Petitioner] does not seek disgorgement to "prevent and restrain" the [Respondents] from producing PB plumbing systems. In fact, in his Second Amended Complaint,

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[14] The Second Circuit has repeatedly reaffirmed its holding in *Carson*. *See United States v. Sasso*, 215 F.3d 283, 290-91 (2d Cir. 2000).

> [he] concedes that the [Respondents] no longer market the plumbing systems.

(Pet. App. 17).

Consequently, the Fifth Circuit properly affirmed the dismissal of Petitioner's RICO claim. However, *even if* the Fifth Circuit too narrowly construed the disgorgement remedy, Petitioner's RICO claim would fail for several other reasons.

B. Petitioner's Inability To Satisfy the Proximate Cause Requirement of *Holmes* Dooms His RICO Claim No Matter What Form of Relief He Seeks

As discussed *infra* (§§ II. C. and D), equitable remedies are not available to private RICO plaintiffs, and Petitioner did not sue for equitable relief. Nevertheless, *even if* he had sued for equitable relief, and *even if* it were a remedy available to him, Petitioner's RICO claim fails – as the district court held – because he cannot satisfy the proximate cause requirement this Court mandated in *Holmes*, which precludes him from establishing RICO standing. Thus, even if equitable relief were potentially available to him, Petitioner still would have to meet the standing requirement of 18 U.S.C. § 1964(c) for maintaining a civil RICO action.

The analysis is straightforward. A private plaintiff's standing to bring a RICO action derives from § 1964(c), which authorizes a private suit under RICO by "any person injured in his business or property by reason of a violation of section 1962." (Pet. 2; 18 U.S.C. § 1964(c)). In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985), this Court explained that a private RICO plaintiff "only has standing if, and can only recover to the extent that, he

has been injured in his business or property by the conduct constituting the violation." Then, in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992), this Court held that the "by reason of" component of § 1964(c) imposes a proximate cause requirement on the plaintiff, *i.e.*, a civil RICO plaintiff must show the alleged predicate acts were the proximate cause of injury to his business or property. In *Summit* the Fifth Circuit held that for mail or wire fraud the proximate cause requirement of *Holmes* can be met only by an allegation that the private plaintiff personally received and relied on the alleged misrepresentation. *Summit*, 214 F.3d at 560-62. Taken together, these cases mean that a private plaintiff who cannot allege that he relied on the defendants' misrepresentations cannot establish the proximate cause required under *Holmes* (and also by *Summit* in the Fifth Circuit). Consequently, under *Sedima* such a plaintiff has no standing to bring a RICO claim based on mail or wire fraud.

Here Petitioner admitted that he did not rely on any alleged misrepresentations by any Respondent and therefore could not satisfy the detrimental reliance requirement of *Summit*. As a result, he could not meet the requirements of § 1964(c) and has no standing to assert a civil RICO claim regardless of what form of relief he seeks. Thus, whether or not equitable relief is available to private RICO plaintiffs, the district court correctly held his RICO claim failed as a matter of law.[15]

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[15] No case – not even *NOW* – would allow a private plaintiff who lacks standing under § 1964(c) to maintain a RICO action for equitable relief. Even that court believed a private RICO plaintiff must meet the standing requirements of § 1964(c) to be able to maintain an action for equitable (or any other form of) relief under § 1964(a). The *NOW* court's

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C. RICO Does Not Authorize Private Plaintiffs To Seek Equitable Relief

Even if Petitioner could meet RICO's standing requirements, no federal court of appeals other than the Seventh Circuit in *NOW* has held that private plaintiffs can seek injunctive or other equitable relief under RICO. Indeed, the great weight of authority holds that RICO does not authorize equitable relief for private parties.

For example, in *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), the Ninth Circuit rejected the availability of injunctive relief for private RICO plaintiffs based on a thorough analysis of both the statute's language and its legislative history. The court reversed a district court's order granting an injunction against the use or dissemination of materials allegedly stolen from the Church of Scientology because "injunctive relief is not available to a private plaintiff in a civil RICO action." *Wollersheim*, 796

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theory was that private parties could sue for injunctive relief by virtue of "the combination of grants in §§ 1964(a) and (c)." *NOW*, 267 F.3d at 697. In other words, the *NOW* court believed that § 1964(c) grants private parties a right of action under the terms specified, and § 1964(a) grants district courts the authority to render injunctive relief in such actions. Therefore, even under the *NOW* theory Petitioner could not obtain equitable relief because he cannot meet the proximate cause requirement of § 1964(c) and hence lacks standing to bring a private RICO action. In fact, the prior opinions in the case establish that the *NOW* courts clearly regarded standing under § 1964(c) as an indispensable element of the plaintiffs' case. On appeal from an initial dismissal of plaintiffs' RICO claims, this Court said "the threshold question" was "whether petitioners have standing to bring their claim." *National Org. For Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994). The Court proceeded only after satisfying itself that plaintiffs had adequately alleged injury to their business or property *by reason of* the defendants' alleged conspiracy. *Id.* at 255-56.

F.2d at 1077. In reaching its decision, the court first analyzed the language of the statute itself:

> Part (a) is a broad grant of equitable jurisdiction to the federal courts. Part (b) permits *the government* to bring actions for equitable relief. . . . Part (c), the private civil RICO provision, states that a private plaintiff may recover treble damages, costs and attorney's fees. In contrast to part (b), there is no express authority to *private plaintiffs* to seek the equitable relief available under part (a). . . .
>
> [T]he inclusion of a single statutory reference to private plaintiffs, and the identification of a damages and fees remedy for such plaintiffs in part (c), logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs.

Id. at 1082-83 (emphasis in original).

Next, the court confirmed that RICO's "legislative history mandates us to hold that injunctive relief is not available to a private party in a civil RICO action." *Id.* at 1084. The court stressed that proposed language expressly authorizing private plaintiffs to sue for injunctive relief as well as treble damages had been rejected by a Congressional subcommittee, which instead adopted a bill that "explicitly created *only* the private action for treble damages which was eventually enacted as section 1964(c)." *Id.* (emphasis in original). Moreover, the Ninth Circuit also found it significant that Congress had subsequently rejected a proposed amendment to § 1964 that would have expressly permitted private parties to sue for injunctive relief. *Id.* at 1085-86. For these reasons, the court concluded that the statute's legislative history also did not support a claim for equitable remedies for private plaintiffs:

> The clear message from the legislative history is that, in considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision.

Id. at 1086 (emphasis in original).

Finally, the Ninth Circuit noted that analogy to the antitrust laws also supported its decision. The court observed that "civil RICO was intended to provide a private cause of action modeled on the analogous provision of the antitrust laws." *Id.* at 1086. The court stressed that the Supreme Court had already held § 4 of the Clayton Act – the provision of the antitrust laws analogous to RICO's § 1964(c) – did not permit a private plaintiff to sue for injunctive relief. *Id.* at 1087. Rather, private antitrust plaintiffs could obtain injunctive relief *only* because another section of the antitrust laws – for which there is no analogous RICO provision – expressly authorized such relief. *Id.* Summarizing its findings, the Ninth Circuit concluded that "taken together, the legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO." *Id.* at 1088.

Although the Fifth Circuit did not deem it necessary to decide the issue (Pet. App. 16), it, and virtually every other court of appeals that has commented on the issue, has also expressed serious doubt that injunctive or equitable relief is available to private plaintiffs under RICO. In *In re Fredeman Litig.*, 843 F.2d 821 (5th Cir. 1988), the Fifth Circuit reviewed the Ninth Circuit's *Wollersheim* decision at length, *id.* at 828-30, and found "the analysis contained in the *Wollersheim* opinion persuasive":

> Congress indeed had several opportunities to give express authorization to private injunctive actions but chose not to do so, apparently because it hesitated in the face of the ramifications of that remedy.

Id. at 830. While the court acknowledged that RICO should be "liberally construed to effectuate its remedial purposes," *id.* at 830, it concluded that "liberal construction" did not allow it to disregard convincing evidence that Congress had not authorized private injunctive remedies. *In re Fredeman*, 843 F.2d at 830.[16]

In light of the strong and persuasive statements by both the Ninth and Fifth Circuits, it is not surprising that the majority of other federal courts of appeals have also expressed substantial doubt that injunctive or other equitable relief is available to private RICO plaintiffs.[17] *E.g.*, *Switzer v. Coan*, 261 F.3d 985, 992 n.14 (10th Cir. 2001) ("there is considerable doubt that equitable relief is available to private RICO litigants under any circumstances"); *Johnson v. Collins Entm't Co., Inc.*, 199 F.3d 710, 726 (4th Cir. 1999) (noting "substantial doubt whether RICO grants private parties . . . a cause of action for equitable relief" and "this doubt is especially acute in

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[16] Subsequent to its *In re Fredeman* decision, the Fifth Circuit has continued to (1) reiterate substantial doubt that injunctive relief is authorized under RICO for private plaintiffs, and (2) emphasize agreement with the Ninth Circuit's holding in *Wollersheim*. *See Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 977 n.42 (5th Cir. 2000); *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 605 n.5 (5th Cir. 1998); *Conkling v. Turner*, 18 F.3d 1285, 1296-97 nn.7 & 8 (5th Cir. 1994).

[17] Most courts have found it unnecessary to decide the issue directly because a civil RICO plaintiff normally has pendent state law claims that will support an award of injunctive relief and obviate the need to decide the RICO issue.

light of the fact that Congress has declined to authorize injunctive remedies for private parties"); *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990) ("it is not clear whether injunctive or other equitable relief is available at all in private civil RICO actions"); *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 28 (2d Cir. 1983) (expressing "serious doubt" about "the propriety of private party injunctive relief" under RICO).

In contrast, the Seventh Circuit in *NOW* is the only federal court of appeals that has allowed injunctive relief to a private litigant under RICO.

D. Petitioner Sued for Damages and Not for Equitable Relief

Finally, while Petitioner hypothesizes that he could sue for equitable disgorgement, in fact he did not. In Petitioner's Second Amended Complaint, Petitioner repeatedly emphasized that the relief he sought on behalf of the class was damages. (Shell App. 35-80, ¶¶ 32(d), 34-36, 50, 73, 79, 86, 92, 141, 151, 160, 161(1)). His only request for equitable relief was for an injunction to bar the use of the *Cox* and *Spencer* judgments to preclude the class "from asserting their rights to recover *damages*." (Shell App. 74, ¶ 129 (emphasis added)). Moreover, contrary to Petitioner's representation (Pet. 20), the class Petitioner sought to certify was a damages class. (3 R. 795-806).

In short, Petitioner's argument for equitable disgorgement was purely hypothetical – conjured up only as a last-ditch effort to try and avoid having to show the direct

reliance necessary to establish RICO damages under *Summit*.[18]

CONCLUSION

The petition for writ of certiorari should be denied. The judgment of the Fifth Circuit was surely correct. The district court properly dismissed Richard's due process attack on the *Cox* and *Spencer* judgments for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine. In addition, the district court properly dismissed Richard's RICO claim for failure to state a claim.

Respectfully submitted,

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[18] Petitioner argues that he "should have been allowed to amend [his] complaint." (Pet. 23). However, Petitioner never sought leave of the district court to amend his complaint. It is well established that a party does not preserve error by merely alleging he should have been given an opportunity to amend his complaint or that he stood ready to amend his complaint. *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 330 (5th Cir. 2002); *United States v. Totten*, 286 F.3d 542, 552 (D.C. Cir. 2002) (plaintiffs whose complaint was dismissed for lack of subject matter jurisdiction waived right to amend by failing to make a motion either before or after the district court granted their opponent's dismissal motion). Instead, a party must move to amend his complaint and claim as error on appeal the district court's failure to allow him to amend. *See id.* Petitioner did neither. Accordingly, he has waived the alleged error.

APPENDIX

IN THE CHANCERY COURT
FOR OBION COUNTY, TENNESSEE
AT UNION CITY, TENNESSEE

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated, Plaintiffs, v. SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION, Defendants.	Civil Action No. 18,844 CLASS ACTION OBION COUNTY

FINAL ORDER APPROVING THE CLASS ACTION SETTLEMENT, ATTORNEYS' FEES AND EXPENSES, AND AWARDS TO REPRESENTATIVE PLAINTIFFS

(Filed Nov. 17, 1995)

This matter is before the Court on motion by the parties[1] for final approval of their proposed settlement

[1] The parties are the named individual and representative *Cox* plaintiffs, on behalf of the certified Settlement Class, and defendants

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(the "Settlement") as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application"). A duly noticed hearing on the motion and Application was held on November 8 and 9, 1995, (the "Fairness Hearing") pursuant to the Court's Order of July 31, 1995, granting preliminary approval of the Settlement and the August 7, 1995, order conforming the class definition (collectively the "Preliminary Approval Order"), under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-out and Objection Dates.

Notice of the Fairness Hearing was given to potential class members nationwide in accordance with the Preliminary Approval Order and the Court approved notice program. Voluminous pleadings and briefs were submitted by the settling parties in support of the Settlement and in response to all objections and motions filed regarding the Settlement, including the various objections and related papers filed by objector Tony Martin, *et al.*, and affiliated objectors through their attorneys (the "Martin Objectors"). The parties, numerous interested members of the Settlement Class, and others appeared at the Fairness Hearing, either individually or by their respective attorneys. The Court heard and

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Shell Oil Company d/b/a Shell Chemical Company and Hoechst Celanese Corporation.

considered evidence in support of the proposed Settlement. This evidence included live testimony, affidavits, documentary and video presentations, as well as oral representations by various attorneys. The attorneys for the parties and others were heard. An opportunity to be heard was given to all other persons requesting to be heard in accordance with the Preliminary Approval Order. This included a significant number of members of the Settlement Class who, in some instances, had traveled great distances from other states to appear and participate in the Fairness Hearing, who were invited to and did make statements and ask questions regarding the terms of the Settlement and the relief it provides.

As more fully set forth below, the Court has determined that the notice given to members of the Settlement Class certified in the Preliminary Approval Order fully and accurately informed the Settlement Class members of all material elements of the proposed Settlement; was the best notice practicable under the circumstances; was valid, due, and sufficient notice to all Settlement Class members; and complied fully with Rule 23 of the Tennessee Rules of Civil Procedure, the United States Constitution, and any other applicable law.

OPINION

The Court has greatly benefited from the fine briefs and oral arguments of the attorneys in this case, all of whom are worthy adversaries, and appreciates the manner in which they have conducted themselves in this most difficult, complex, and hotly contested litigation. Great credit must be given to Judge Richard Silver of

Monterey County, California for his initiative to coordinate a settlement conference with the *Cox* and *Spencer*[2] parties. The revised *Cox* Settlement is due, in no small part, to his efforts. The Court also commends Judge Hardaway of Greene County, Alabama, for his willingness to join in this unprecedented effort by three state courts to coordinate and settle competing national class actions. As to the settling parties, the plaintiffs, the plaintiff class, Shell Oil Co., and Hoechst Celanese Corp., the Court acknowledges that if it were not for your recognition of this opportunity to reach a global settlement of these issues, all of these efforts would have been in vain. You have put aside your armor and your hardened positions from years of battle and have finally made peace.

Compromises are favored in the law. Neither this Court, nor any court, has the resources to fully litigate all issues, nor is it always fair to the parties to do so. The time, cost, and lack of finality of protracted litigation require certain matters to be settled. The polybutylene plumbing litigation's time has come. Closure is not only appropriate, but timely. The parties to this and to the many other individual and group cases that have comprised the polybutylene plumbing litigation have fought long and hard with varying degrees of success and defeat; however, the affected party, the consumer, has seen very little benefit from these efforts. The *Cox* settlement agreement is a compromise. In every compromise, each side must abandon or set aside its ideal

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[2] *Spencer, et al. v. Shell Oil, et al.*, Case No. CV 94-074, Circuit Court of Greene County Alabama, Honorable Eddie Hardaway, Jr., presiding.

position and reach an agreement that is fair and reasonable to all concerned under the circumstances, and not insist on terms only beneficial to one party. The *Cox* settlement is not perfect. I would have preferred that the Agreement include no leak requirements and a larger claims "window" for class members. The Court has some concern the $75 million cap on past damages may not adequately pay all past damages in full; however, these concerns must be weighed in light of the numerous unique advantages to the consumer that the *Cox* settlement does provide.

The Court finds the Settlement is fair, adequate and reasonable. The $950 million dollars is a minimum contribution of the defendants to those who are affected by polybutylene plumbing. When the court initially gave preliminary approval to the proposed Settlement, this factor was the leading factor in granting that approval. As counsel for the parties have confirmed at various times in open court as the hearings have progressed in this matter, the initial funding commitment (now increased to $950 million) may ultimately be more if funds are expended and provided by the defendants and if other responsible parties contribute to the fund in the future. Due to the uncertainty of the size of the class and how many claims will ultimately be filed, this Court would not have approved a "limited fund" which provided less than full relief while demanding full release. If the worst case does present itself, that is, if the class is as large as six million people, all claims are presented, and the fund is totally expended; the only prejudice to the consumer will be the delay caused by the filing of claims and payment of funds. The Agreement tolls statutes of limitations for class members. The

Agreement provides that any consumers not fully reimbursed or compensated under the terms of the Agreement would be able to pursue all legal and equitable claims and remedies (including punitive damages) individually and as a class.

The Court finds the notice program is excellent. As specified in the findings below, the evidence supports the conclusion that the notice program is one of the most comprehensive class notice campaigns ever undertaken. The Court is satisfied that all reasonable efforts have been made to reach affected consumers.

The Court must also consider the complexity, the expense, and the likely duration of these proceedings if settlement were not reached and approved. The Court must weigh the benefits of settlement against the likely outcome of litigation. As the Court has already stated, much has been spent and much has been done over the past years in group and individual polybutylene pipe litigation across the country, but not much has been accomplished for the benefit of the consumer. The claims in *Cox* and *Spencer* each have their own legal problems, which, if fully litigated, would delay the ultimate resolution of these cases for many years to come. If litigated, complex legal issues would be presented, such as statutes of limitations and repose, choice of appropriate state laws, liability, and measure of damages. All of these issues, if litigated and appealed, could clog the courts across the country for years to come. There is a question as to whether some state courts would give full faith and credit to another state court's determination of these issues.

It is an important aspect of the Settlement that the plaintiffs' attorney's fees and costs are paid by the defendants in addition to the settlement fund, and are not deducted from the settlement fund. In the absence of a comprehensive Class Settlement now, as presented here in *Cox*, after the resolution of the contentious issues described above, any ultimate recovery available for consumers would be reduced by attorney's fees. These normally range from a third to forty percent. None of this delay, risk, mounting transaction costs and reduction of recovery by individual fees would be in the long-term interest of the consumer. In *Cox*, the attorney's fees requested are much less; approximately five percent of the settlement fund; moreover, unlike a typical contingent fee, they are not paid from the fund. The request for fees in the case is approved. The Court finds that they are reasonable under the circumstances, and the Court is pleased to approve them.

The Court is pleased with the reaction of the class members to the proposed Settlement. The Court is greatly comforted by the small number of individual opt-outs, the removal of objections by *Spencer* class counsel and by Tony Martin, who is represented by the Fleming group, and the support expressed by the consumers who testified at the Fairness Hearing. The Court finds that the Consumer Plumbing Recovery Center ("CPRC") claims facility procedures which have been outlined to the Court and which are provided for in the Agreement, appear to constitute a simple, consumer-friendly and efficient method of adjusting the claims in this case.

The discussions and negotiations that ultimately lead to the settlement presented for Court approval were, from all reports and from the Court's own observation,

intensive, exhaustive, and often heated. The Court finds the Agreement is the result of good faith, arms-length, and non-collusive negotiations. The Agreement is fair, adequate, and reasonable under the circumstances, and it is approved.

ADDITIONAL FINDINGS AND CONCLUSIONS

The entire matter of the proposed Settlement and the Application having been fully heard and duly considered by the Court, the Court further FINDS and CONCLUDES, in addition to the findings and conclusions in the foregoing Opinion, as follows:

1. The polybutylene plumbing litigation has been pending, in various forms and in various courts around the country, for more than a decade. It has included individual cases, cases with large numbers of individual plaintiffs, and putative nationwide or statewide class actions brought in federal court and in many state courts.

2. The first nationwide polybutylene plumbing class action was filed in September 1993 by lawyers who are now members of the team of *Cox* Class Counsel. The action, *Robert Beeman, et al. v. Shell Oil Company, et al.*, No. 93-047363, was filed in a state district court in Harris County, Texas.

3. Over the course of many months of intensive negotiations, involving a neutral mediator at many critical junctures, a tentative settlement of the *Beeman* case was achieved in October 1994. In February 1995, however, the Texas state court denied preliminary approval of that settlement without comment.

4. After the Court in this case certified the nationwide class on June 13, 1995, *Cox* Class Counsel joined with the plaintiffs' attorneys in the *Beeman* action to prosecute this case for the benefit of mobile and site-built homes with polybutylene plumbing across the country.

5. Collectively, this combined team of Class Counsel included highly qualified and well-regarded lawyers with extensive class action and complex litigation experience, as well as lawyers with vast experience in polybutylene plumbing litigation.

6. Class Counsel then were able to negotiate a settlement generally patterned after that originally arrived in *Beeman*, although the minimum funding commitment was $100 million greater, other features were added, and only two of the three *Beeman* defendants, Shell and Celanese, were involved.

7. Because of the pendency of a nationwide class action in Greene County, Alabama, and of other polybutylene actions around the country, with many brought as class actions, including an uncertified case for a putative statewide mobile homeowner class in the Superior Court of Monterey County, California,[3] Judge Hardaway and this Court agreed that Judge Silver in Monterey would further the cause of final resolution of polybutylene plumbing litigation if he was appointed to serve as a settlement judge for all three courts.

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[3] *Meers, et al vs. Shell Oil, et al*, Case No. M 30590, Superior Court of the State of California, County of Monterey, Honorable Richard M. Silver, presiding.

8. Judge Silver issued an October 12, 1995 *Order Setting Settlement Conference* with the endorsement of this Court and Judge Hardaway, to convene the coordinated settlement process. Other state courts with proposed class actions were asked, by the parties and/or by Judge Silver, to dismiss or stay their proceedings in deference to the coordinated settlement effort in order to give it an opportunity to succeed, undistracted by collateral litigation.

9. Accordingly, from October 23, 1995, through November 7, 1995, the day before the Fairness Hearing in this Court, intensive and continuous global settlement negotiations were conducted among *Cox* Class Counsel, the *Spencer* counsel, and defendants' counsel and representatives through the mediation and supervision of Judge Silver.

10. As a result of these concentrated efforts, a comprehensive settlement was reached, resulting in significant enhancements to the Settlement as it was originally presented to the Court and preliminarily approved on July 31, 1995.

11. The resulting Settlement, documented and as presented for final approval at the Fairness Hearing, provides consumers with a recovery program consisting of reimbursement of otherwise unreimbursed expenses for repairs to and replacement of leaking polybutylene plumbing systems and property damage caused by such leaks, as well as an extensive program for replacement of such leaking plumbing systems.

12. Some of the features of this Settlement are these:

a. Free replacement of polybutylene plumbing systems installed since January 1, 1978, if two or more qualifying leaks occurred before August 21, 1995, or if only one such leak occurs either in the two years following that date or during a period (of from 10 to 16 years, depending on the type of structure) following installation of the system;

b. Reimbursement of the unreimbursed expenses of plumbing repairs, replacements, and property damage from January 1, 1978, to August 21, 1995, up to $75 million will be distributed, *pro rata* if necessary, for these expenses; and property damage after August 21, 1995, at 100 cents on the dollar;

c. An unlimited funding potential, with the defendants committed to to [sic] initially provide up to $950 million for the relief; if additional funds are required, the defendants will either provide them, or litigation will be resumed with all applicable statutes of limitations and repose tolled in the interim;

d. Provision for additional relief to eligible members of the Settlement Class who experience special needs in connection with qualifying leaks;

e. A comprehensive notice program, including notice every three years through the life of the program, which ends in 2009; and

f. The payment of class counsel's attorneys' fees and expenses in addition to the $950 million reserved for relief for the Settlement Class.

13. The Court is not aware of any other class action settlement with successive notice as provided in the *Cox* Settlement.

14. In reaching this Settlement, the defendants have foregone very significant defenses and issues which could have precluded or limited liability as to some or many class members' claims. These include the statutes of limitations and repose, selection of the appropriate states' laws applicable to various issues, the "economic loss" limitation on recoveries of the type sought here, the lack of privity between the members of the Settlement Class and the defendants, the fact that many of the members of the Settlement Class purchased their structures "as is," and, of course, the risk that plaintiffs would not be successful in proving their allegations. In agreeing to this Settlement, the defendants have displayed commendable corporate responsibility, responsiveness, and good will toward consumers.

15. The Court appointed Rust Consulting, Inc. and Kinsella Communications Ltd. as class notice providers in this case. Richard Redfern, president of Rust Consulting, and Katherine Kinsella, president of the communications firm bearing her name, testified at the Fairness Hearing. The Court also considered Ms. Kinsella's affidavit and the affidavit of Jeffrey Dahl, Executive Vice President of Rust Consulting, in connection with their activities as notice providers.

16. *Cox* Class Counsel and the notice providers worked with Todd B. Hilsee, an experienced class action notice consultant, to design a class notice program of unprecedented reach, scope, and effectiveness. Mr. Hilsee was accepted by the Court as a qualified class notice expert at an earlier hearing to approve the commencement of the notice program. He testified at the Fairness Hearing, and his affidavit was also considered

by the Court, as to the operation and outcome of this program.

17. The above-mentioned individuals provided documents, information, and affidavits at the outset of the notice period that assisted the parties in designing, and the court preliminarily approving for implementation, a singularly comprehensive and creative notice program.

18. Beginning in August, 1995, and extending into October, 1995, an extensive notice effort was undertaken in this case to implement the Court approved notice program specified in the Preliminary Approval Order.

19. Since not all Settlement Class members were known or readily identifiable, the notice program implemented in this case combined multimedia publication (newspapers, magazines, radio and television), individual mailed notice, ongoing press and media outreach, and a toll-free telephone information service. The purpose of the program was to make potential Settlement Class members aware of the Action and the Settlement, and to encourage them to identify themselves to the notice providers, as they could receive further written notices and information, and be placed on the notice providers' Settlement Class member database.

20. Commencing on or before August 21, 1995, which is the Initial Notice Date as specified in the Agreement, more than 5.6 million copies of the Court approved Notice of Class Action and Proposed Settlement were mailed, by first class mail or overnight service, to Settlement Class members in accordance with the Preliminary Approval Order.

21. During September, 1995, the Court approved summary notice was published in *Parade* Magazine, *USA Weekend*, *People* Magazine, and *TV Guide* in accordance with the Preliminary Approval Order. The combined circulation of these consumer publications and national magazines is over 73 million. During August and September, 1995, Court approved notice appeared twice in Friday editions of *USA Today*, with combined circulation of over 4.7 million.

22. Also during September, 1995, the Court approved summary notice appeared in 201 daily and weekly newspapers in 13 targeted states (Alabama, Arizona, California, Colorado, Florida, Georgia, Louisiana, Maryland, Nevada, North Carolina, South Carolina, Texas, and Virginia) and the District of Columbia. The combined circulation of these newspapers exceeds 23.6 million. In addition, the notice appeared in Spanish in 38 Hispanic newspapers, with a combined circulation over 3 million, in 29 media markets during September, 1995. Moreover, the notice appeared in 247 daily, weekly, bi-monthly, and monthly African-American newspapers with a combined circulation of nearly 6 million.

23. Notices were also published in the October, 1995, editions of various trade publications, comprising a total circulation of 244,000.

24. A 30-second spot television notice was produced and appeared 213 times from August 21, 1995, through September 3, 1995, on national and cable television, including on such networks as ABC, NBC, CBS, TNN, CNN, and TNT. During the same period, a 30-second Spanish language television notice appeared

18 times on the Univision Network, a popular Spanish language network.

25. A press release, a media advisory, a public service announcement, a video news release, a radio news release, and a press kit were all prepared and disseminated as part of the notice program in this case. The press release went to 2,000 newspapers, wire services, magazines, and broadcast points across the United States through PR Newswire. The press release and media advisory were also disseminated to 469 media outlets, specifically targeting consumer reporters and media in the top 250 media markets and 84 local daily newspapers in the 13 targeted states and the District of Columbia. 142 outlets, with a combined circulation of more than 14.5 million, have confirmed using the press materials to publish articles. It is estimated that the public service announcement was broadcast by radio stations yielding nearly 2.9 million gross impressions; an additional 5.5 million impressions are estimated from the broadcast of the radio news release. The video news release was used by at least 21 outlets with combined viewership of more than 1.7 million. Finally, a two-column article was provided to 10,000 daily and weekly newspapers.

26. Court approved notice forms were disseminated through various online computer services, including CompuServe, Prodigy, and America Online, and with Legal Link on the Internet.

27. The various forms of published notice provided recipients with a toll free "800" telephone number to which potential Settlement Class members could call to obtain further information and to request the full notice

packet to be mailed to them. The telephone message was updated as the notice program progressed, and commonly raised questions were answered by live operators, in English or Spanish as required by the caller. The parties prepared and updated scripts and information by which the operators were able to provide the general information commonly requested by callers.

28. The toll-free telephone facility established for notice purposes in this case received more than one million telephone calls in response to the published notice program.

29. Over 195,000 requests for a claim form have been received by the notice providers.

30. Mr. Hilsee demonstrated, by affidavit and in live testimony at the Fairness Hearing, a number of significant facts regarding the reach and effectiveness of the notice. The national media campaign reached an extraordinarily high percentage of United States adults aged 35 years and over: approximately 114 million individuals, or 92.11% of this population. Each of these adults was exposed to the national media notice an average of 4.01 times. The national media campaign also reached approximately 151 million persons in the United States aged 25 years and over, representing 90.88% of this population. Each of the individuals in this larger, secondary target group was reached an average of 3.76 times by the national media notice, a frequency that also exceed [sic] the primary target reach in other class actions. These are higher reach and frequency statistics than have been found adequate by courts in other class actions. These data do not include the reach of the notice campaign through means other

than the national paid notice campaign, such as the television and print notices targeted to Hispanic and African-American media, the local newspaper notices, the non-paid media and direct mail notices to millions of Settlement Class members.

31. Multifaceted notice programs like that implemented in this case have been approved by other courts and utilized successfully for similar purposes in large consumer or product class actions such as this one, where most class members are not individually identified at the outset. *See, e.g., In re Domestic Air Transportation Antitrust Litigation*, 141 F.R.D. 534 (E.D. Pa. 1992); 148 F.R.D. 297 (E.D. Pa. 1992); *In re Silicone Gel Breast Implant Products Liability Litigation*, MDL 926 (N.D. Ala. 1994); *Roberts v. Bausch & Lomb, Inc.*, 94-C-1144-W (N.D. Ala. 1995).

32. As other courts have done with respect to the less comprehensive notice programs they approved, this Court finds that the notice program described above, as designed and implemented, met and exceeded the requirements of the United States Supreme Court, Tennessee's Rule 23, due process and the Constitution, as construed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and its progeny.

33. Thus, the best notice practicable under the circumstances has been provided to members of the Settlement Class. That notice accurately and adequately advised them of this action; the proposed Settlement and its terms, features, and benefits; their rights and options; and the applicable procedures and deadlines for exercising them.

34. A full opportunity has been provided to the members of the Settlement Class to participate in the Fairness Hearing, both orally and by way of written submission to the Court.

35. The Court previously found the requirements of Rule 23 of the Tennessee Rules of Civil Procedure were met and certified a nationwide class for litigation and trial purposes in the Order of National Class Certification. While such certification was and is contested by the defendants, they have agreed to class certification for settlement purposes, to promote a comprehensive, classwide resolution of polybutylene pipe litigation.

36. The numerosity, typicality, commonality, and adequacy requirements of Rule 23.01 of the Tennessee Rules of Civil Procedure are satisfied as to the Settlement Class in connection with the Settlement in this case.

37. In accordance with Rule 23.02(3), common issues of fact and law predominate and make certification of the Settlement Class for settlement purposes efficient and appropriate. The members of the Settlement Class have been afforded the right and opportunity to exclude themselves from the Settlement Class.

38. The settlement encompassed within the Agreement is in all respects fair, reasonable, and adequate and in the best interests of the Settlement Class.

39. The Court-approved notice program provided clear and simple procedures and instructions for the submission of objections by or on behalf of Settlement Class members. For example, paragraph 10 of the Court-approved *Notice of Class Action and Proposed*

Settlement required objections to be submitted, in writing, postmarked not later than October 20, 1995, and further stated, "if you do not comply with the procedure and the deadline stated herein, you may not be entitled to be heard at the Fairness Hearing or to otherwise contest the approval of the Settlement, or to appeal from any orders or judgments of the Court entered thereon." All objections, however styled, that failed to comply with the procedures and deadlines set forth in the notice program, are hereby found to be procedurally deficient and are disqualified in accordance with the foregoing statement.

40. The Court has also reviewed the Principles of Agreement dated November 7, 1995, executed by the parties, including the terms applicable to U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The terms of the Principles of Agreement appear to be reasonable and in accordance with the efforts being made to seek a global resolution of all litigation pertaining to the issues among the parties. The prior *Cox* settlement was unclear as to the effect of funds received from U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The revised settlement makes clear that amounts received from U.S. Brass and/or Eljers will add to the minimum fund of $950 million. If that settlement is perfected and approved by the United States Bankruptcy Court, the minimum fund would substantially increase.

41. In independently determining to approve the Settlement and the Application, the Court has considered the substance of all objections to the Settlement, whether timely, qualified or not, including those by the

Martin Objectors and others that have since been withdrawn or stricken.

42. Certain objectors have asserted that the proposed Settlement must be reduced by a proposed settlement of claims against du Pont in the *Spencer* case pending in the Circuit Court of Greene County, Alabama, which the objectors characterized as a $120 million settlement.

43. The proposed du Pont settlement has not been approved by the *Spencer* court, and this Court may not speculate whether it will be approved by the *Spencer* court.

44. The proposed du Pont settlement in *Spencer* purports to entitle a claimant to a rebate of 8% of monies the claimant pays for replumbing his or her structure.

45. The Settlement before this Court, in the minimum amount of $950 million, provides for the assignment of Settlement Class members' claims against du Pont and others to defendants Shell and Celanese.

46. Objectors are incorrect in asserting that the "credit" arising from the assignment reduces the Defendants' contribution to the Settlement. The original *Cox* settlement was $850 million to be paid by the Defendants. The revised *Cox* settlement requires the Defendants to pay a minimum of $950 million to consumers with assignment of rights, against du Pont, regardless of whether du Pont ultimately participates in the settlement. The revised *Cox* settlement substantially increases benefits to consumers.

47. Contrary to objectors' assertions, all interest earned on funds held by the CPRC will be for the benefit of

the Settlement Class and will not be credited against the Defendants' obligations under the Agreement.

48. Because of the structure of the Settlement, the Defendants' obligation to fund the CPRC on an ongoing, as-needed basis, and the Defendants' obligation to pay reimbursement for Past Expenses in a reasonable time after the close of the one year claim filing period on August 21, 1996, and any related opt out period that may be necessary under § 4.5.1 of the Agreement, there is no significant ability by the Defendants to delay payments due under the Settlement.

49. Objectors are incorrect in asserting that, even before the Defendants' initial funding commitment was increased from $850 million to $950 million, the "net funding by Shell and Celanese under . . . the agreement [was] only $547 million."

50. The notice provided to the Settlement Class was neither misleading nor defective.

51. The defendants are each responsible for one-half of the settlement obligations as specified in the Settlement Agreement unless and until the respective liabilities are established by arbitration under the Funding Agreement.

52. The *Cox* Class Counsel have undertaken a reasonable risk that each of the defendant companies will be solvent and capable of fulfilling its obligations under this agreement.

53. Had the plaintiffs settled at separate times with Shell and Celanese, it is highly unlikely that there would ever have been joint and several liability between them.

54. The Settlement is more favorable to the Settlement Class than litigation if it is assumed that one of the defendants will, some years from now, become unable to pay all claims, since the class will receive payment under the Settlement promptly, thereby reducing the number of claimants who would be subjected to proving claims in a bankruptcy.

55. The Agreement provides broad ranging powers for the enforcement of a defaulting defendant's obligations, including the full panoply of equitable powers this Court possesses.

56. The Agreement expressly provides that the default of one defendant does not exonerate the other defendant of its obligations under the Agreement.

57. Past expenses will be compensated after expiration of one year from August 21, 1995, the Initial Notice Date under the Agreement.

58. Claimants will not, contrary to an objection, be required to wait 14 years to receive their entitled reimbursements or distributions under the Agreement.

59. The so-called exclusion of a "hot water heater leak" – a leak occurring within six feet of piping measured from the take-off at the unit's hot water heater – does not apply to any claim for reimbursement of repair costs and property damage. Thus, the only exclusion is for eligibility for a replumb, and even there, the exclusion applies only if (1) it is the first leak in the unit *and* (2) it can be repaired without cutting into the unit's walls, ceilings, or floors.

60. Therefore, a replumb will be provided under the Agreement even if the hot water heater leak is the first leak, if to repair the leak would require cutting into the

walls, ceilings, or floors of the unit. Similarly, there will be a replumb if the hot water heater leak is the second leak in the system.

61. The claimant has the right to select the contractor to do the replumbing and property damage repair work.

62. Nothing in the Agreement abrogates the warranty of work done by the contractors and suppliers of pipe and other components in the replumb.

63. The Agreement permits special relief involving unusual hardship, so long as the CPRC Ombudsman and President concur that such relief should be provided. This provision allows the CPRC to provide relief from a breach of warranty arising out of replumbing work, where the warrantor fails to provide or cannot provide corrective relief. CPRC § VI, E.

64. There is no factual basis for the asserted objection that there is any conflict of interest with respect to the *Cox* Class Counsel.

65. The *Cox* Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case.

66. There is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* Settlement.

67. There is no need to provide additional notice to the entire Settlement Class by reason of the revised terms of the Settlement since the Court approved the notices disseminated to the Settlement Class. All changes have

been to improve the Settlement over that described in the notices, and none of the changes has an adverse impact on any Class member.

68. As class action jurisprudence has accumulated, various federal and state courts, in Tennessee and elsewhere, have articulated criteria and factors that courts may consider in evaluating proposed settlements for final approval. *See, e.g., Third Nat'l Bank v. Scribner*, 212 Tenn. 400, 410, 370 S.W.2d 482 (1963); *Clark Equip. Co. v. International Union, Allied Indus. Workers*, 803 F.2d 878, 880 (6th Cir. 1986), *cert. denied sub nom. Jones v. Clark Equip. Co.*, 480 U.S. 934 (1987); *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983); *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735 (S.D.N.Y. 1985) *aff'd*, 798 F.2d 35 (2d Cir. 1986); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). This Court has been guided, generally, by the procedures and criteria recommended in the *Manual for Complex Litigation*, 3d ed. (Federal Judicial Center 1995), §§ 30.4 *et seq.*, since the federal and Tennessee class action provisions and criteria are consistent.

69. Factors that may be considered in assessing the fairness, adequacy, and reasonableness of the proposed settlement include: the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; the stage of the proceedings at which the settlement is reached; the extent of cumulative discovery or investigation; the nature of the settlement negotiations; the costs, risks, and delays of establishing liability and damages; the views of experienced counsel; the reaction of the class members themselves; the comparison of the settlement's benefits with

other settlements or with the alternative of continuing litigation; and whether approval of the settlement is in the class members' and the public interest. As the above opinion and findings demonstrate, consideration of these and other recognized factors, such as the participation and recommendations of an experienced and able settlement judge and the testing of the settlement's merits in the class of adversary proceedings, demonstrate the Settlement's entitlement to approval.

70. Expert opinions have been submitted in support of the proposed Settlement. (*See* Opinion of Professor David Rosenberg, Affidavit of Professor Paul H. Rubin). In approving the Settlement, the Court has considered these opinions.

71. The Court will retain jurisdiction and address a supplemental notice program, on a joint motion of the settling parties, to advise all members of the Settlement Class on whose behalf a purported or actual request for exclusion was received of the enhanced Settlement, providing those individuals with a new opportunity to request exclusion from the Settlement Class in light of the enhanced Settlement.

72. There is no just reason for delay in the entry of a final judgment and decree by reason of such supplemental notice and related proceedings or of the retention by the Court of continuing jurisdiction to oversee the implementation and enforcement of the Agreement and Settlement.

73. The Application is fair and should be granted.

Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The Court has jurisdiction over all claims asserted in the Action on behalf of all Settlement Class members and over all parties to the Action, including all members of the Settlement Class.

2. The Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.

The definition of the Settlement Class excludes:

> (1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in

and for the County of San Diego, and all members of the certified classes in those lawsuits.

3. All members of the Settlement Class who have not timely elected to be excluded from the Settlement Class are members thereof and are bound by this Order and the Final Judgment being entered herewith.

4. Pursuant to Rule 23.01, Rule 23.02, and Rule 23.03 of the Tennessee Rules of Civil Procedure, the Court confirms the certification of the Settlement Class provided in the Preliminary Approval Order and maintains such certification for purposes of final approval of the settlement.

5. The Class Representatives and Plaintiffs' Class Counsel designated in paragraph 8 of the Court-approved *Notice of Class Action and Proposed Settlement* to represent the Settlement Class are hereby confirmed.

6. The Agreement and the Funding Agreement entered into by the Defendants pursuant to the Agreement are hereby made part of the record in this case and as such shall have the full force and effect of an order of the Court.

7. Pursuant to Rule 23.05 of the Tennessee Rules of Civil Procedure, the Court hereby grants final approval of the Agreement and the Settlement set forth in the Agreement and finds that it is fair, adequate, and reasonable to the members of the Settlement Class.

8. The objections that were filed, whether timely or not, have been considered and are all overruled.

9. Accordingly, the Court directs that the Settlement be consummated in accordance with the terms and conditions of the Agreement.

10. Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

11. The Complaint as amended, and all claims and causes of action asserted therein are dismissed with prejudice and costs, as provided in the Agreement, to be paid from the settlement fund.

12. The Application is hereby granted. In accordance with the Funding Agreement referred to in the Agreement, the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid. In addition, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

13. In the event that the Settlement does not become Final (as more fully defined in the Agreement) in accordance with the terms of the Agreement, then this Order

and the Final Judgment and Decree being entered herewith shall be rendered null and void and be vacated and the Agreement shall be rendered null and void in accordance with the provisions thereof.

14. Without affecting the finality of this Order or of the Final Judgment being entered herewith, the Court shall retain continuing jurisdiction over the Action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the Settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Agreement.

15. Any disputes or controversies arising with respect to the interpretation, enforcement, or implementation of the Agreement shall be presented by motion to the Court.

16. Pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, the Court hereby directs the entry of this judgment based upon the Court's finding that there is no just reason for delay notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement and its continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

/s/ W. Maloan
CHANCELLOR

ENTERED: November 17, 1995

IN THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated, Plaintiffs, v. SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION, Defendants.	Civil Action No. 18,844 CLASS ACTION OBION COUNTY

FINAL JUDGMENT

(Filed Nov. 17, 1995)

This matter is before the Court on motion by the parties for final approval of their proposed settlement as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application").

A hearing on the motion and Application was held on November 8 and 9, 1995, pursuant to the Court's Order of

July 31, 1995, granting preliminary approval of the settlement and the August 7, 1995, order conforming the class definition, under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-outs and Objection Dates.

This Final Judgment is entered pursuant to a Final Order Approving the Class Action Settlement, Attorneys' Fees and Expenses, and Awards to Representative Plaintiffs (the "Final Order") which is entered together herewith. The Court has determined that the Class Action Settlement, as encompassed within the Agreement, should be approved as fair, adequate, and reasonable to the Settlement Class under Rule 23.05 of the Tennessee Rules of Civil Procedure, and that the Application should be granted.

The Court has further determined that there is no just reason for delay in the entry of final judgment in accordance with the Final Order pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.

Accordingly, it is ORDERED that judgment is hereby entered in accordance with the Final Order.

It is further ORDERED that the Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of

leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.

The definition of the Settlement Class excludes:

(1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in and for the County of San Diego, and all members of the certified classes in those lawsuits.

It is further ORDERED that the Court directs that the settlement be consummated in accordance with the terms and conditions of the Agreement.

It is further ORDERED that the Amended Complaint and all claims and causes of action asserted therein are dismissed with prejudice with costs to be paid from the settlement fund in accordance with the terms of the Settlement Agreement.

It is further ORDERED that, in the event that the settlement does not become final (as more fully defined in

the Agreement) in accordance with the terms of the Agreement, then this Final Judgment and the Final Order shall be rendered null and void and be vacated, and the Agreement shall be rendered null and void in accordance with the provisions thereof.

It is further ORDERED that, without affecting the finality of the Final Order and this Final Judgment, the Court shall retain continuing jurisdiction over this action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Settlement Agreement.

It is further ORDERED that, subject and pursuant to the terms and conditions of the Agreement, Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

It is further ORDERED that, in accordance with the above-described Application and the Funding Agreement

ferred to in the Agreement, the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million, plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid.

It is further ORDERED that, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

It is further ORDERED, pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, that the Court hereby DIRECTS the entry of this judgment as a final judgment based upon the Court's finding that there is no just reason for delay, notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement as set forth above, and the Court's continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

Dated at Union City, Tennessee, this 17 day of November, 1995.

/s/ W. Michael Maloan
W. MICHAEL MALOAN,
CHANCELLOR

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

RICHARD R. RICHARD, JR., on behalf of himself and all others similarly situated,	§	
Plaintiffs,	§	CASE NO. 500 CV 008
vs.	§	
HOECHST CELANESE CHEMICAL GROUP, INC.; SHELL OIL COMPANY D/B/A SHELL CHEMICAL COMPANY; HOECHST CELANESE CORPORATION; and E.I. DUPONT DE NEMOURS & COMPANY,	§	
Defendants.	§	

SECOND AMENDED COMPLAINT

Plaintiff Richard R. Richard, Jr., on behalf of himself and all others similarly situated, submits this Second Amended Complaint against Defendants Hoechst Celanese Chemical Group, Inc., Shell Oil Company d/b/a Shell Chemical Company, Hoechst Celanese Corporation and E.I. DuPont de Nemours & Company (collectively "the Polybutylene Group"):

INTRODUCTION

1. This class action lawsuit is brought to recover damages for injury caused by the Polybutylene Group's

manufacture, promotion and sale of polybutylene for use in residential and commercial plumbing systems for potable water. Not only was polybutylene unsuitable for such use, but the Polybutylene Group knew their product was defective for this purpose. Nevertheless, the Polybutylene Group promulgated fraudulent misrepresentations in order to continue to produce and sell polybutylene systems without regard to the damage such systems would impose on unknowing purchasers. Plaintiffs bring the First through Fourth Causes of Action under the Racketeer Influenced and Corrupt Organization (RICO) statute, 18 U.S.C. §§ 1961 et seq.. The Fifth Cause of Action arises under Section 42(a) of the Lanham Act, 15 U.S.C. § 1125 to recover damages arising from the Polybutylene Group's misrepresentations in commercial advertising and promotion. The Sixth Cause of Action alleges violation of the Due Process Clause of the U.S. Constitution. The Seventh through Tenth Causes of Action sound respectively in conspiracy, strict liability, negligence and breach of implied warranties under Texas law.

JURISDICTION

2. The Court has subject matter jurisdiction pursuant to 18 U.S.C. § 1964(c) (RICO); 28 U.S.C. Section 1338 (Trademark Jurisdiction) in that this action arises, in part, under 15 U.S.C. § 1125(a) (Lanham Act); 28 U.S.C. § 1331 (Federal Question Jurisdiction) and 28 U.S.C. § 1367 (Supplemental Jurisdiction).

VENUE

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b), because Plaintiff resides in this district

and a substantial portion of the events giving rise to the claims set forth in this action took place herein.

THE PARTIES

4. Plaintiff Richard R. Richard, Jr., (Richard), is an individual residing in the Eastern District of Texas who owns structures equipped with polybutylene plumbing. Richard has never participated in a polybutylene class action lawsuit in a court with competent personal and subject matter jurisdiction over him.

5. Defendant Hoechst Celanese Chemical Group, Inc., now known as Celanese, Ltd., (Celanese) is a limited partnership with its office in Dallas, Texas. At all material times, Celanese was authorized to conduct and did conduct business in Texas. Celanese's registered agent in Texas is CT Corporation System, 350 North St. Paul Street, Dallas, Texas 75201.

6. Defendant Shell Oil Company d/b/a Shell Chemical Company (Shell) is a Delaware corporation. At all material times, Shell was authorized to conduct and did conduct business in Texas. Shell's registered agent in Texas is CT Corporation System, 350 North St. Paul Street, Dallas, Texas 75201.

7. Defendant Hoechst Celanese Corporation, now known as HNA Holdings, Inc. (HNA) is a Delaware corporation. At all material times, HNA was authorized to conduct and did conduct business in Texas. HNA's registered agent in Texas is CT Corporation System, 811 Dallas Avenue, Houston, Texas 77002.

8. Defendant E.I. DuPont de Nemours & Company (DuPont) is a Delaware corporation. At all material times,

DuPont was authorized to conduct and did conduct business in Texas. DuPont does not maintain a registered agent or office for service of process in Texas and may be served through the Secretary of State, Statutory Documents Section, P.O. Box 12887, Austin, Texas 78711.

FACTS APPLICABLE TO ALL COUNTS

9. Polybutylene resin (polybutylene) is a type of plastic that is produced as a by-product of oil refining. In the late 1970's, Shell developed flexible pipes made of polybutylene which were promoted and marketed for residential and commercial potable water plumbing systems.

10. Joint fittings for polybutylene plumbing systems were made from resins developed by Celanese and DuPont. The resin developed by Celanese was marketed under the name "Celcon." DuPont's resin was sold as "Delrin."

11. The Polybutylene Group produced the materials used in the pipes, joints, fittings and resins that comprised polybutylene plumbing systems. In some instances, the Polybutylene Group promoted and/or marketed the components or systems themselves.

12. Polybutylene systems were sold to the mobile home industry, recreational vehicle industry, residential developers, plumbing contractors and individuals. Promoters of polybutylene systems claimed their product was superior to existing plumbing systems because it was lightweight, inexpensive, better able to withstand freezing temperatures, easier to install and purportedly would last fifty years.

13. However, despite such representations, hundreds of thousands of polybutylene systems developed leaks when, inter alia, they were exposed to chlorinated water such as most municipalities use.

14. In 1988, the plastic plumbing industry estimated that six million polybutylene systems had been installed in the United States. Such systems continued to be sold until approximately 1996.

15. By the early 1980s, the Polybutylene Group knew the polybutylene systems were failing and would continue to fail. Nevertheless, the Polybutylene Group continued to promote and sell its defective products.

PREVIOUS POLYBUTYLENE LITIGATION

16. Not surprisingly, the defective polybutylene systems spawned considerable litigation. Defendants fought class certification in polybutylene class action litigation for over a decade.

17. Then, in 1994, a sweetheart class action settlement was reached [in] a Texas state court action, *Beeman v. Shell Oil,* No. 93-47363, D.Ct., 16th Cir., Harris County, TX. The proposed settlement would have amply compensated plaintiffs' attorneys but sharply limited defendants' damages to a token amount for each unit of repair funding. When the state court rejected the settlement, the parties tried unsuccessfully to remove the case to Texas federal court.

18. While this was happening, another class action, Spenser v. Shell Oil, No. CV94-074, Greene Cty., (Ala. Cir. Ct.) was filed in Alabama. Several months later, the Spenser plaintiffs moved for class certification and approval

of a partial settlement with DuPont. Their motion was set for hearing on June 28, 1995.

19. On June 13, 1995, the Beeman counsel went to rural Tennessee and filed a new state court class action against the Beeman defendants. The new case was styled Cox v. Shell Oil, No. 18,844 (Tenn. Chanc. Ct., Obion Cty.). The same day Cox was filed, the Tennessee court certified Cox as a national polybutylene class action, ex parte, with Defendants' acquiescence. No hearing on class certification was ever conducted by the Tennessee chancery court.

20. As competing national class actions, Spenser and Cox engaged in an opt-out war and race to the courthouse. Spenser was set for trial on November 27, 1995.

21. In July 1995, a mere forty-five days after Cox was filed, the parties formalized an amicable settlement.

22. After reaching accord, the Cox litigants hurried preliminary court approval of the settlement, notice program, opt-out period and fairness hearing.

23. Only weeks before the fairness hearing, the Cox settlement was jeopardized by several hundred thousand opt-outs.

24. Just before the fairness hearing, the competing Spenser and Cox class actions met for mediation in California and reached a putative joint national settlement.

25. At about the same time, the Defendants settled the opt-out individual claims for amounts that did not reflect the amounts agreed to in the proposed settlement.

CLASS ALLEGATIONS

26. Plaintiff brings this action on behalf of himself as well as a class of similarly situated persons pursuant to Fed. R. Civ. P. 23. The Class is defined as follows:

> All Texas citizens, residents and entities authorized to do business in Texas that own plumbing systems in structures in Texas and elsewhere, in which there is polybutylene plumbing and over which Tennessee and Alabama courts lacked subject matter jurisdiction.
>
> All U.S. citizens and entities that were excluded from the settlement classes of Cox v. Shell Oil Co., No. 18,844 (Tenn. Chanc. Ct., Obion Cty.) and Spencer v. Shell Oil Co., No. CV94-074 (Greene Cty., Ala.) because defects in their polybutylene plumbing systems were defined as non-qualifying.
>
> All U.S. citizens and entities that own structures containing polybutylene plumbing systems and have never participated in a polybutylene class action in a Court of competent personal and subject matter jurisdiction.
>
> Excluded from the Class are: (1) All persons and entities that retained counsel to assert claims arising out of defects in polybutylene plumbing systems before this Complaint was filed; (2) All persons asserting claims for personal injury; (3) the Defendants, their parent, subsidiary, or affiliate organizations and all of their officers, directors, agents, servants and employees; (4) All persons and entities that timely opt out of this proceeding; and (5) the judge and his family.

27. This action is brought and may properly be maintained as a class action since the requirements of

numerosity, typicality, adequacy, predominance and superiority are satisfied.

28. Members of the Class and subclasses as defined herein in paragraph 26 are so numerous that joinder of all claims is impracticable.

29. The exact number and identities of all Class and subclass members is not known to Plaintiff and can only be ascertained through discovery. Nevertheless, Plaintiff is informed and believes that the Class includes millions of individuals.

30. There are numerous questions of law and fact common to the Class. Such common questions include, but are not Limited to:

The acts and practices of the Polybutylene Group in the practices described in paragraphs 1 through 29 above;

Whether the Polybutylene Group made misrepresentations in commercial advertising and the extent to which such misrepresentations were likely to influence purchasing decisions;

The extent to which the Polybutylene Group's misrepresentations in commercial advertising, if any, deceived or tended to deceive recipients;

The extent to which the Polybutylene Group's misrepresentations in commercial advertising, if any, were likely to injure plaintiffs;

Whether the Polybutylene Group engaged in fraudulent and illegal practices;

The extent to which 18 U.S.C. § 1964(c) is applicable to the activities of the Polybutylene Group and the existence of

an "enterprise" and a pattern of unlawful activity with respect to conspirators under that law;

Whether Polybutylene Group members committed numerous acts of mail fraud in furtherance of their scheme;

Whether Polybutylene Group members violated Texas common law and statutory provisions in a uniform and fraudulent scheme;

Whether the Cox (Tennessee) and Spenser (Alabama) state courts had proper personal and subject matter jurisdiction over members of the Class;

Whether putative class members were deprived of a meaningful opportunity to participate or opt-out of the Cox (Tennessee) and Spenser (Alabama) polybutylene class action litigation;

31. Common questions of law and fact exist as to all subclass members, and such common questions predominate over any questions affecting only individual subclass members. The questions of law and fact common to the subclass are, without limitation:

(a) Whether the Polybutylene Group marketed the PB system for potable water supply applications even though they knew or should have known that the system would deteriorate when exposed to chlorine commonly found in potable water;

(b) Whether the Polybutylene Group omitted material facts in the distribution and sale of the PB system about the defective performance and short life expectancy of the PB system;

(c) Whether the Polybutylene Group introduced the PB system into the stream of commerce and misrepresented its fitness for a particular purpose and suitability for its foreseeable use;

(d) Whether the Polybutylene Group knew or should have known that the PB system was fundamentally and chemically defective and would eventually cause damage to the Plaintiffs and other consumers, including subclass members;

(e) Whether the Polybutylene Group intentionally or negligently omitted material information concerning the PB system that was known at the time of the transactions, and that such omissions were intended to induce the Plaintiffs to act which, but for the omissions, the Plaintiffs would not have acted;

(f) Whether the Polybutylene Group intentionally or negligently represented that the PB system had sponsorship, approval, characteristics, uses, and benefits that it did not have;

(g) Whether the Polybutylene Group was negligent in ascertaining the truth or falsity of their statements concerning the quality and characteristics of their products; and

(h) Whether the Polybutylene Group conspired to promote the PB system even though they knew it was defective and unsuitable for use with potable water, and whether one or more of the Polybutylene Group members commenced a tort in furtherance of the conspiracy.

32. The representative Plaintiffs will fairly and adequately protect the interests of the members of the Class. The Plaintiffs' claims are coextensive with, and not

antagonistic to, the claims of the Class members. The Plaintiffs have retained counsel who are competent and experienced in class and complex litigation. No conflict exists between the Plaintiffs and the Class members because:

(a) The claims advanced by the Plaintiffs are typical of the claims of each member of the subclass they represent;

(b) The Plaintiffs' claims arise from the same course of conduct, and they are based upon the same legal theories, as the claims of all other Class members;

(c) The Plaintiffs and each member of the Class have a common interest in prevailing on the same legal claims;

(d) The types of damages incurred by the Plaintiffs are similar to those incurred by the members of the Class they represent;

(e) The claims of the Class are coextensive and may materially vary only in the degree of damages;

(f) The Plaintiffs and their counsel have the necessary financial resources to adequately and vigorously litigate this class action, are aware of their fiduciary responsibilities to the Class members, and are determined to diligently discharge those duties by vigorously seeking the maximum possible recovery for the Class.

In addition, Plaintiffs urge that:

(a) The prosecution of separate actions by or against individual members of the class would create a risk of

(i) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(ii) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(b) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(c) Where the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(d) The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to the available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(i) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

(ii) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(iii) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(iv) The difficulties likely to be encountered in the management of class action.

33. A class action is an appropriate method for the fair and efficient adjudication of this controversy. Class treatment can best secure the economies of time, effort and expense for all interested parties and the court system, promote uniformity, and accomplish the ends of equity and justice for the various subclass members with relatively small claims that might otherwise go unremedied.

34. The damages suffered by individual Class members may be relatively small, and the expense and burden of individual litigation makes it impossible for those Class members individually to redress the wrongs done to them.

35. The Plaintiffs' attorneys have already obtained extensive discovery from similar cases in other jurisdictions concerning liability and damages. Such discovery includes: (a) depositions from almost all of the Polybutylene Group's officers and employees involved with polybutylene research, development, promotion and management decisions; and (b) detailed investigations by a number of experts and the expert analysis of damages to thousands of structures.

36. The liability and damages issues may be tried at a near date in that these issues have been previously adjudicated on identical facts in foreign jurisdictions.

GENERAL ALLEGATIONS

37. Defendants, and others acted together in the development, promotion and marketing of the PB system.

38. The Polybutylene Group made material factual misrepresentations and omissions which constituted a producing cause of damages sustained by the Plaintiffs and the class members, in that:

(a) The Polybutylene Group marketed the PB system for potable water supply applications even though they knew or should have known the system would deteriorate when exposed to chlorine which is commonly found and in potable water;

(b) The Polybutylene Group omitted material facts about the defective performance and short life expectancy of the PB system;

(c) The Polybutylene Group introduced the PB system into the stream of commerce in Texas and elsewhere by materially misrepresenting that it was suitable for its foreseeable use;

(d) The Polybutylene Group intentionally or negligently concealed material negative information concerning the PB system that was known at the time of the transactions;

(e) The Polybutylene Group intentionally or negligently misrepresented that the PB system was of a particular standard, quality or grade when in fact, it was of another; and

(f) The Polybutylene Group intentionally or negligently misrepresented that the PB system had

sponsorship, approval, characteristics, uses, or benefits that it did not have.

39. Such misrepresentations and omissions were false in that:

(a) Polybutylene, in an application that allowed exposure to chlorine normally found in potable water systems, was fundamentally, chemically, and irreversibly defective in that it deteriorated and failed when exposed to chlorine;

(b) The Polybutylene Group knew that polybutylene was unsuited to applications involving exposure to chlorine which is normally formed [sic] in potable water systems;

(c) Despite their knowledge of polybutylene's unsuitability to potable water system applications, the Polybutylene Group represented that it was safe and suitable for such applications; and

(d) The Polybutylene Group willfully, knowingly, and intentionally or negligently placed an inherently defective product into the stream of commerce in Texas and elsewhere for pecuniary gain and in flagrant or negligent disregard of the Plaintiffs' and Class members' rights.

40. Further, Defendants took advantage of the lack of knowledge, ability, experience, or capacity of the Plaintiffs to know of the substantial, latent defects in the plumbing system or components thereof, and as such, took advantage of their lack of knowledge, ability, experience and capacity to a grossly unfair degree.

41. As a direct and proximate result of the misrepresentations and material omissions alleged above, the Polybutylene Group induced the Plaintiffs to purchase structures that contained inherently defective polybutylene plumbing systems.

42. Had the Polybutylene Group truthfully represented the nature of polybutylene to the Plaintiffs, the Plaintiffs would not have purchased structures containing polybutylene plumbing systems.

43. The PB system cracks, corrodes and leaks, and is not suitable for use as a potable water system because:

(a) Polybutylene pipe deteriorates when exposed to chlorine commonly found in potable water;

(b) The resin Celcon, and all fittings made from Celcon, corrode and fail when exposed to chlorine commonly found in potable water;

(c) The expansion and contraction caused by hot water commonly found in potable water systems accelerates fatigue and causes failure of the PB system fittings;

(d) The heat in the hot water supply found in potable water systems accelerates the deterioration of the PB system; and

(e) Polybutylene pipe cracks from crimp rings that are used to join the pipe because the crimp ring system renders it almost impossible for workmen to crimp the fittings with adequate but not excessive pressure.

44. The Polybutylene Group also made material omissions to code bodies, trade associations, governmental

entities, and Class members regarding problems with the polybutylene system.

45. The Polybutylene Group aggravated the effect of their omissions by making claims that the PB system was suitable for potable water plumbing when it was not, and that the PB system had a long service life, which it does not.

46. The Polybutylene Group intentionally omitted information they possessed concerning the inherent chemical defects of the PB system and of its short service life.

47. Manufacturers, code bodies, trade associations, governmental entities, builders and Class members were misled by these misrepresentations and omissions, with the result that the PB system has been widely used in residential plumbing and was used in the structures owned by the Plaintiffs and the class.

48. The misrepresentations and omissions were intended to induce manufacturers, code bodies, trade associations, governmental entities, builders and Class members to approve, promote or use the PB system.

49. As a direct and proximate result of the Polybutylene Group's conduct, the Plaintiffs and the Class members have suffered damages through the use of the PB system in their structures.

50. The Plaintiffs and the Class have suffered, and will continue to suffer, damages to their structures and improvements, as well as damage to the personal property contained therein. The Plaintiffs and the Class have incurred, and will continue to incur, expenses in repairing and/or replacing the PB system and the damage to their

structures, improvements, and personal property. The Plaintiffs and the Class also have incurred, and will continue to incur, expenses from loss of use of their property, such as for temporary lodging and meals, and have suffered and will continue to suffer loss of the use, benefit and enjoyment of their structures, and a reduction in the value of same.

51. The Plaintiffs have retained the undersigned counsel to represent them in this lawsuit and are obligated to pay reasonable attorneys' fees.

52. Questions of law and fact common to the Class, including the legal and factual issues relating to operation of the scheme described herein, and the liability and the nature of the relationships among the Polybutylene Group, predominate over any questions affecting only individual members.

53. A class action is superior to other available methods for the fair and efficient adjudication of this controversy: the Class is readily definable, and can be identified to a significant extent by discovery; prosecution of this case as a class action will eliminate the possibility of repetitious litigation and will provide redress for claims which otherwise may be too small to support the expense of individual, complex litigation against the defendant; there are no problems which would make this case difficult to manage as a class action.

CIVIL RICO SUMMARY

54. In connection with the activities giving rise to this action, the defendant acted with malice, intent, and

knowledge, and with a wanton disregard of the rights of named plaintiffs and the Class herein.

55. During relevant times herein, the "enterprise" described below was engaged in interstate commerce in that, inter alia, the polybutylene systems and components thereof which are the subject of the Polybutylene Group's scheme to defraud were used and transported in interstate commerce.

56. During relevant times herein, in connection with the activities giving rise to this action, each member of the Polybutylene Group conspired with each of the other conspirators to engage in the various activities set forth herein, agreed to participate in the operation of the conspiracy to defraud the named plaintiffs and Class members herein, and aided and abetted one another in these activities, all as proscribed as set forth further herein below.

57. As set forth herein, during the relevant times, and in furtherance of and for the purpose of executing the scheme and artifice to defraud, the members of the Polybutylene Group on numerous occasions used and caused to be used mail depositories of the United States Postal Service by both placing and causing to be placed mailable matters in said depositories and by removing and causing to be removed mailable matter from said depositories. Each such use of the U.S. mails in connection with the scheme and artifice to defraud constituted the offense of mail fraud as proscribed and prohibited by 18 U.S.C. §§ 2, 1341. These instances of mail fraud were a substantial factor in the sequence of responsible causation; and the injuries to plaintiffs and the class were reasonably foreseeable or anticipated as a natural consequence of the mail

fraud; and plaintiffs and the class suffered damages by reason of the mail fraud.

FIRST CLAIM FOR RELIEF –
VIOLATION OF FEDERAL LAW – 18 U.S.C. § 1962(a)

58. The allegations of paragraphs 1 through 57 are incorporated herein by reference as if fully set forth.

59. The Plaintiff and each class member is a "person" within the meaning of 18 U.S.C. § 1961(3) and 1964(c).

60. The members of the Polybutylene Group are "persons" within the meaning of 18 U.S.C. §§ 1961(3) and 1962(a).

61. Through agreements to provide polybutylene systems and the components thereof to purchasers and through contractual arrangements and joint promotional activity for marketing the polybutylene systems, each member of the Polybutylene Group formed an association-in-fact with the other conspirators which constitutes an "enterprise" engaged in illegal activities affecting interstate commerce pursuant to 18 U.S.C. §§ 1961(4) and 1962(a).

62. Each of the conspirators was associated with this "enterprise" and did use or invest income derived from a pattern of unlawful activity under 18 U.S.C. §§ 1961(1) and (5) to operate, maintain control of, and maintain an interest in the enterprise.

63. These unlawful activities included multiple instances of mail fraud in the issuance of false and deceptive commercial advertising and promotion, multiple

instances of mail fraud in the issuance of false and deceptive product description to consumers and multiple instances of mail fraud in the receipt of sums representing payment received for polybutylene systems and components thereof, all in violation of 18 U.S.C. §§ 2, 1341.

(a) Defendants perpetrated specific acts of mail and wire fraud including, without limitation, the following:

(i) Shell mailed a letter, dated August 6, 1987, on Shell letterhead, from Scott J. Elstad, Manager Market Development, Polybutylene Business Center, to Richard Church, Executive Director, PPFA, enclosing a draft of a manual on polybutylene pipe which contains fraudulent misrepresentations concerning polybutylene systems and fittings. The letter instructs Mr. Church to "forward [the section on limitations on fittings] to DuPont and Celanese for their review and *written approval* . . . " (Emphasis added.) By faxed communication, DuPont reviewed and approved of the letter in furtherance of the fraud and conspiracy. Shell brought DuPont into the conspiracy during the final two years it was promoting polybutylene systems because of DuPont's chemical expertise and the large profits to be made from false and misleading promotion of polybutylene systems;

(ii) Shell mailed letters with attachments on November 5, 1986, on Shell letterhead, from M.J. O'Brien, Sales Manager, Polybutylene Business Center. An attached memo states that "the following letter was sent to U.S. Brass, Bow, Vanguard, EPC and Wesflex." The letter and attached study of sales potential for polybutylene plumbing pipe in manufactured housing contains blatant misrepresentations and fraudulent statements about polybutylene systems;

(iii) Celanese mailed a note in May 1978 on Celanese letterhead to M. Scott Elstad (Shell's Manager of Market Development), enclosing an April 1978 bulletin on the properties of Celcon, the registered trademark of the Celanese Corporation's polybutylene. The bulletin contains numerous fraudulent statements and misrepresentations concerning polybutylene;

(iv) Celanese mailed a letter in April 1981 on Celanese letterhead from John Pope, Celcon Market Development Supervisor, to a customer, W.J. McGlinchy, Western Products Company, apparently in response to Mr. McGlinchy's concerns about polybutylene systems. The letter contains several false and misleading statements about polybutylene systems, including "there is no evidence available which suggest that chlorinated water has resulted in premature part failure;"

(v) Celanese mailed a computer form-letter dated July 26, 2985 [sic], on Celanese letterhead, signed "Regards, Celanese Engineering Resins, S.J. Iannelli, Industry Manager, Fluid/Material Handling to a merge list of 17 individuals and businesses. The letter contains false and misleading information and material omissions about the use of polybutylene in plumbing applications (*see* Exhibit "E" attached hereto);

(vi) Shell mailed a letter on May 16, 1980, to Keith Swinehart of Vanguard Plastics enclosing the completed artwork for "downsized versions of our 'Polybutylene Plumbing Pipe Runs Circles Around the Competition' advertisements." The advertisements contain false and misleading representations;

(vii) Celanese mailed a letter on January 6, 1987, signed by Chuck A. Calhoun, Senior Sales Representative,

to Bill Brennan of Plastamatic Corporation which said, among other false and misleading statements that "we are aware of no serious problems" in connection with polybutylene insert fittings for the mobile home and RV markets;

(viii) Shell's employee, A.H. Schroer, used the telephone on October 21, 1982, to tell Celanese's employee Diane Datson, that he had tried to check on the status of research work on the use of Celcon (Celanese's polybutylene product), but "they just want to duck that whole issue;"

(ix) Shell sent a letter via certified mail (return receipt requested) on May 14, 1987, to a distribution list of more than a dozen plumbers and wholesalers that contained false and misleading statements and omissions. The letter was signed by L.A. Petershagen, Manager, Polybutylene Business Center, and represented that there had been "a *few* isolated instances . . . [of] . . . premature oxidation failure in polybutylene pipe." (Emphasis added.) The letter further asserted that recent laboratory data "did not change the outlook for continuing satisfactory service under normal conditions." These statements are false and misleading. DuPont approved the contents of this letter and was informed of numerous similar letters to small businessmen whose purpose was to deceive wholesalers and plumbers about the defects of polybutylene systems by omissions and false or misleading representations;

(x) The CBS News Documentary "60 Minutes" covered the widespread failure of polybutylene systems in an episode sardonically entitled, "The Best Thing Since Sliced Bread." The title derives from Defendants'

wide-spread promotional campaign advertising polybutylene systems as "the best thing since sliced bread." A significant portion of the 60 Minutes expose focused on debilitating problems that the failure of its polybutylene systems caused the City of San Antonio, Texas. The video of the 60 Minutes broadcast illustrates what the documents referred to herein establish – that Defendants engaged in specific unlawful acts as part of a deliberate conspiracy to defraud the public. (A copy of the 60 Minutes broadcast is provided herewith as Exhibit "A".)

64. The purpose of the Polybutylene Group's and conspirators' association-in-fact was to fraudulently advertise and sell polybutylene systems that they knew to be unsuitable for potable water. This association-in-fact by the Polybutylene Group and other conspirators enabled them to sell millions of defective polybutylene systems that directly caused injury to Plaintiff and other members of the Class.

65. The association-in-fact had a common or shared purpose; that is, to sell polybutylene systems and thereby defraud members of the public. The scheme had a distinct division of labor and continued as a unit, with a core membership, over a substantial period of time and was an ongoing organization established for an economic motive.

66. Each member of the Class owns one or more structures containing a polybutylene system.

67. The Polybutylene Group's promotion and sale of polybutylene systems, including fraudulent and false statements relied on by plaintiff and other members of the Class, were intended to and did assure the plaintiff and Class members that the polybutylene systems were suitable for potable water plumbing systems.

68. The Polybutylene Group's false and fraudulent promotion of polybutylene systems furthered the purposes of the enterprise described herein, that is, to generate additional sales of the defective polybutylene systems and permit the Polybutylene Group members to reinvest profits from defrauded Class members in perpetuating the enterprise. The Polybutylene Group members participated in a massive fraud, an illegal and profitable scam, which took advantage of the plaintiffs' and the Class' reasonable reliance on the apparent legitimacy of the product.

69. These activities of the association-in-fact form a pattern, continuous in nature, which consists of multiple unlawful acts directed to the named Plaintiff and to each Class member. The illegal activities of the Polybutylene Group persisted over an extended period of time. Each fraudulent promotional activity and each act of mail fraud was an act in furtherance of the conspiracy for which the Polybutylene Group members are liable. The reliance of the plaintiff and the members of the class on falsehoods and omission of accurate information concerning the polybutylene system's defects in the promotional material was reasonable and justified.

70. These activities of the Polybutylene Group and other conspirators entailed multiple instances of mail fraud consisting of intentional mail fraud intended to induce, and inducing, plaintiffs and the class to purchase defective products in violation of 18 U.S.C. §§ 2, 1341.

71. Through the use of this illegal and fraudulent scheme, and through its efforts to operate and maintain the enterprise described herein and to maintain the conspiracy to sell defective products and create illegal profits, the defendant and other conspirators caused

Plaintiff and Class members to provide them with considerable funds to purchase polybutylene systems.

72. Members of the Polybutylene Group retained these unlawfully gained funds and reinvested and used those funds in their operations in violation of 18 U.S.C. §§ 2, 1962(a).

73. Plaintiffs and all class members have been injured in their property by reason of the operation of the enterprise in this unlawful manner.

WHEREFORE, Plaintiffs seek judgment against the Polybutylene Group, on behalf of themselves and the Class herein, consisting of their actual damages suffered as a result of the illegal acts set forth herein, plus treble damages, plus reasonable costs and attorneys' fees, plus pre and post judgment interest, plus such further relief as this Court deems appropriate.

SECOND CLAIM FOR RELIEF – VIOLATION OF FEDERAL LAW – 18 U.S.C. § 1962(c)

74. The allegations of paragraphs 1-73 are incorporated herein by reference as if fully set forth.

75. The Plaintiff and each Class member is a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

76. The Polybutylene Group and each of the coconspirators are "persons" within the meaning of 18 U.S.C. §§ 1961(3) and 1962(c).

77. The association-in-fact described in the "First Claim for Relief" above was an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c), which

enterprise was engaged in, and the activities of which affect, interstate commerce.

78. Members of the Polybutylene Group were associated with the enterprise and participated in its management and operation by directing its affairs and by formulating and promulgating intentional or negligent misrepresentations in an effort to boost sales. They participated, directly and indirectly, in the conduct of the enterprise's affairs through a pattern of unlawful activity under 18 U.S.C. § 1961(1), consisting of multiple acts of mail fraud, in violation of 18 U.S.C. §§ 3, 1341.

79. The unlawful activity described in the foregoing paragraphs consists of multiple instances of mail fraud in violation of 18 U.S.C. §§ 2, 1341, including, inter alia, issuance of illegal, deceptive and fraudulent commercial advertising and promotion.

WHEREFORE, plaintiffs seek judgment against the Polybutylene Group on behalf of themselves and the Class herein, consisting of their actual damages suffered as a result of the illegal acts set forth herein, plus treble damages, plus reasonable costs and attorneys' fees, plus pre and post judgment interest, plus such further relief as this Court deems appropriate.

THIRD CLAIM FOR RELIEF – VIOLATION OF FEDERAL LAW – 18 U.S.C. § 1962(d)

80. The allegations of paragraphs 1-79 are incorporated herein by reference as if fully set forth.

81. The Plaintiff and each member of the Class are "persons" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

82. The Polybutylene Group and each of the other conspirators are "persons" within the meaning of 18 U.S.C. §§ 1961(3) and 1962(d).

83. The association-in-fact described in the "First Claim for Relief" above was an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(a), which enterprise was engaged in, and the activities of which affect interstate commerce.

84. The Polybutylene Group and each of the other conspirators were associated with the enterprise described herein, and conspired within the meaning of 18 U.S.C. § 1962(d) to violate § 1962(a).

85. The Polybutylene Group and the other conspirators conspired to use or invest income derived from a pattern of unlawful activity under 18 U.S.C. § 1961(1) to operate, maintain control of, and maintain an interest in the enterprise and have done so through a pattern of unlawful activity including under 18 U.S.C. § 1961(1), inter alia, multiple instances of mail fraud in violation of 18 U.S.C. §§ 2, 1341.

86. The Plaintiff and each Class member has suffered injury to his property within the meaning of 18 U.S.C. § 1964(c) by reason of the commission of overt acts constituting illegal activity in violation of 18 U.S.C. §§ 1961(1), 1962(d).

WHEREFORE, Plaintiff seeks judgment against the Polybutylene Group, on behalf of himself and the Class herein, consisting of their actual damages suffered as a result of the illegal acts set forth herein, plus treble damages, plus reasonable costs and attorneys' fees, plus

pre and post judgment interest, plus such further relief as this Court deems appropriate.

FOURTH CLAIM FOR RELIEF –
VIOLATION OF FEDERAL LAW – 18 U.S.C. § 1962(d)

87. The allegations in paragraphs 1-86 are incorporated herein by reference as if fully set forth.

88. The Plaintiffs and each Class member are "persons" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

89. The Polybutylene Group and each other conspirator are "persons" within the meaning of 18 U.S.C. §§ 1961(3) and 1962(d).

90. The association-in-fact described in the "First Claim for Relief" above was an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c), which enterprise was engaged in, and the activities of which affect, interstate commerce.

91. The Polybutylene Group was associated with and participated in the operation of the enterprise and conspired within the meaning of 18 U.S.C. § 1962(d) to violate 18 U.S.C. § 1962(c). The members of the Polybutylene Group conspired with the other conspirators to conduct or participate, directly or indirectly, in the conduct of the affairs of the enterprise in relationship to the Class and to named plaintiff, through a pattern of unlawful activity, including under 18 U.S.C. § 1961(1), inter alia, multiple instances of mail fraud in violation of 18 U.S.C. §§ 2, 1341.

92. The Plaintiff and each Class member has suffered injury to his property within the meaning of 18

U.S.C. § 1964(c) by reason of the commission of overt acts constituting illegal activity in violation of 18 U.S.C. §§ 1961(1), 1962(d).

WHEREFORE, the Plaintiff seeks judgment against the Polybutylene Group on behalf of himself and the Class herein, consisting of their actual damages suffered as a result of the illegal acts set forth herein, plus treble damages, plus reasonable costs and attorneys' fees, plus pre and post judgment interest, plus such further relief as this Court deems appropriate.

FIFTH CLAIM FOR RELIEF – VIOLATION OF SECTION 43(a) OF THE LANHAM ACT

93. The allegations of paragraphs 1 through 92 are incorporated herein by reference as if fully set forth.

94. The Polybutylene Group engaged in a conscious, intentional and systematic pattern of false and misleading representations concerning the polybutylene system to the damage of the Plaintiff and the Class herein.

95. The Polybutylene Group promulgated false statements concerning the nature, characteristics and qualities, including but not limited to the physical and chemical properties; standard, quality or grade; and uses and benefits of the polybutylene system. In addition to being factually false, the statements were framed in such a way as to create a misleading impression of the strength and durability of the polybutylene system. The Polybutylene Group also failed to disclose critical facts, such as the rapid deterioration of polybutylene when exposed to chlorine in levels usually present in potable water.

96. These false representations were made in connection with commercial advertising or promotion of the polybutylene system in a conscious effort to increase sales. The Polybutylene Group knew the representations were false and misleading and did not reflect current understanding of the physical properties of the polybutylene system.

97. The misrepresentations actually deceived the Plaintiff and other members of the Class.

98. The misrepresentations made by the Polybutylene Group were intended to convince potential purchasers that the polybutylene system was superior to alternative potable water plumbing systems. Thus the misrepresentations were designed to influence purchasing decisions and for that reason were likely to do so.

99. Plaintiffs and other members of the Class were actually injured by the misrepresentations of the Polybutylene Group. It was highly likely that such misrepresentations would cause damage to persons who owned structures containing polybutylene systems because when plumbing systems in residential or commercial buildings leak, damage to property is common.

100. The misrepresentations of the Polybutylene Group were made in a commercial context.

101. These violations caused plaintiffs to suffer actual damages.

WHEREFORE plaintiffs seek judgment against the Polybutylene Group, on behalf of themselves and the Class herein, for all damages sustained by the Plaintiff and members of the Class as a result of the acts complained of herein, and that such damages be trebled because of the

wilful acts described herein in disregard of the known rights of plaintiff and members of the Class. Plaintiff further requests that each member of the Polybutylene Group be required to account to Plaintiff for any and all gains, profits and advantages derived from the activities complained of in this action and be assessed punitive damages for malicious, wilful and reckless disregard of the rights of others. Plaintiff also requests that the Polybutylene Group be required to pay to Plaintiff all of his litigation expenses, including reasonable attorney fees and the costs of this action, and such other and further relief as this Court deems appropriate.

SIXTH CLAIM FOR RELIEF – VIOLATION OF THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION

102. The allegations of paragraphs 1 through 101 are incorporated herein by reference as if fully set forth.

103. The putative national class action settlements in Cox and Spencer purport to deny plaintiff and other members of the Class an opportunity to litigate their claims against the Polybutylene Group.

104. Cox and Spencer, however, do not bar this action because the state courts that adjudicated those actions lacked personal or subject matter jurisdiction over Plaintiff and this Class.

105. Tennessee and Alabama, through "Door Closing Statutes" or via decisional law interpreting due process limits on jurisdiction, lacked personal jurisdiction and subject-matter jurisdiction over all nonresident causes of action, which seek to recover for damage to structures located outside Tennessee and Alabama.

106. As Defendant Shell Oil Company successfully argued in Case No. 95-CP-10-1948 in the Court of Common Pleas, Ninth Judicial Circuit, County of Charleston, State of South Carolina, another polybutylene class action, "Under the door closing statute, the Court does not have subject matter jurisdiction over cases involving foreign Plaintiffs suing foreign defendants over causes of action not arising in this state."

107. Tennessee has a Door Closing Statute which is similar to South Carolina's and which similarly bars the Tennessee Court's authority to adjudicate claims against foreign corporations arising from activities outside the state. Counsel for Defendant Shell concealed from the *Cox* court the fact that Defendant Shell urged in the South Carolina litigation that the Door Closing Statute divested the South Carolina Court of subject matter jurisdiction for all non-resident claims.

108. In the South Carolina polybutylene class action, Defendant Shell successfully persuaded the Court to hold, "This Court cannot assert jurisdiction over the claims of non-resident potential class members under SCRCP 23 if claims do not arise in South Carolina or whose property at issue is not situated within this state."

109. For the same reasons Defendant Shell established in South Carolina, the Tennessee (*Cox*) Court and the Alabama (*Spencer*) Court lacked subject-matter jurisdiction and personal jurisdiction over the Plaintiffs herein, who, for due process purposes, were strangers to the *Cox* and *Spencer* cases. However, Shell's counsel in *Cox* urged that the Tennessee Court properly had subject matter jurisdiction over the putative national settlement class, including non-resident class members owning structures

outside Tennessee, and in spite of Tennessee's Door Closing Statute. At the same time, Shell's counsel argued the opposite in South Carolina.

110. Since the Plaintiffs are not residents of Tennessee or Alabama, under the respective "Door Closing Statutes" or relevant decisional law, the Tennessee Court (*Cox*) and the Alabama Court (*Spencer*) lacked jurisdiction over the subject-matter of this litigation, which includes damage to structures located outside Tennessee and Alabama.

111. Upholding Shell Oil Company's argument on the Door Closing Statute to limit the claims of the purported class, the South Carolina Court stated, "Failure to meet the requirements of the Door Closing Statute deprives the Court of subject matter jurisdiction over the claims of nonresident punitive (sic) class members." Counsel for Shell concealed from the South Carolina Court the fact that it advanced a conflicting argument before the *Cox* Court.

112. The Plaintiffs and Class members herein are not bound by the *Cox* and *Spencer* judgments since the respective Tennessee and Alabama Courts lacked subject-matter jurisdiction, and the requirements of due process dictate that the relevant foreign judgments are not entitled to full faith and credit.

113. Plaintiffs and class members herein did not have a meaningful opportunity to participate or opt-out of the Tennessee and Alabama "polybutylene" litigation.

114. Concerning South Carolina's Door Closing Statute, Defendant Shell successfully urged that the statute, " . . . by its terms . . . does not allow actions by non-residents against corporations not incorporated in

South Carolina except in two situations: (1) where the cause of action arises in South Carolina; or (2) where the subject of the action is situated within South Carolina."

115. Plaintiffs and class members herein did not consent to the foreign judgments in Tennessee and Alabama, and thus these judgments cannot be binding on claimants herein without offending due process.

116. The South Carolina Court succinctly articulated its conclusion, "The Door Closing Statute divests this Court of subject matter jurisdiction over foreign claims by non-resident Plaintiffs against defendants organized or existing under the laws of a state other than South Carolina."

117. By the putative, national class adjudications in Tennessee and Alabama, claimants herein were deprived of a full and fair opportunity to litigate their claims, and thus were deprived due process of law.

118. Since the Tennessee and Alabama judgments were rendered without judicial jurisdiction over the subject-matter of the instant product-liability claims, the decisions of those Courts are void as to the claimants in this case. Those judgments, by definition were rendered without any claim of jurisdiction for non-qualifying leaks.

119. The Tennessee and Alabama judgments did not comply with due process requirements for the claimants herein, and therefore these judgments are not entitled to full faith and credit.

120. To the extent Defendants herein will seek to enforce, by full faith and credit, the foreign judgments against plaintiffs herein, this court has the duty to inquire and to closely scrutinize the underpinnings of a foreign

court's assertion of jurisdiction over non-resident plaintiffs and their claims.

121. In its Order Denying Summary Judgment on the full faith and credit question, the South Carolina Court noted, "In the context of a class action, a state Court may only exert jurisdiction over a non-resident by providing due process in its own proceeding." The Court continued, "Any interested party may collaterally attack a judgment on the ground of lack of jurisdiction at any time."

122. Addressing due process concerns of a single, giant settlement class, a la *Cox* and *Spencer,* the United States Supreme Court stated:

> The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. (Citation omitted). "[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." (Citation omitted).
>
> As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned.
>
> * * *
>
> The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the

whole, not for a separate constituency. In another asbestos class action, the Second Circuit spoke precisely to this point:

> Where differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups. (Citation omitted). *Amchem Products. Inc. v., Windsor,* 521 U.S. 591, 117 S. Ct. 2231, 138 L.Ed.2d 689 (1997).

123. The *Cox* and *Spencer* courts did not use subclasses to align interests of class members. The *Cox* preliminary certification order, dated June 13, 1995, only contained conclusory findings as to the Rule 23 criteria:

> The court finds that the requirements for certifying a class under Rule 23 are met. The requirement as to numerosity is met. Plaintiff alleges that as many as six million homes have polybutylene plumbing systems. Joinder of these claims is therefore impracticable. Since the same issues of fact and law arise as to defendants' defective product, commonality of the issues exists. Plaintiff's claim, like those of all other class members, arises from defendants'

> allegedly defective product and their failure to disclose material information. The typicality requirement is satisfied. Finally, the Court is satisfied that plaintiff, who has retained counsel with extensive experience prosecuting class actions, including consumer class actions, will be a fair and adequate representative of the class.
>
> The questions of law and fact which are common to the members of the class in this case predominate over any questions that affect only individual members. Furthermore, a class action suit is the fairest and most efficient means of adjudicating this case. Accordingly, the Class satisfies all requirements for certification under Rule 23.

124. In contrast to the exhaustive certification analysis required by *Amchem Prod. Inc. v. Windsor* 521 U.S. 591, 117 S. Ct. 2231, 138 L.Ed.2d 689 (1997), the *Cox* Court's conclusory holding in favor of certification is formed in three paragraphs of its order dated November 17, 1995, relying upon the findings in the preliminary order:

> 35) The Court previously found the requirements of Rule 23 of the Tennessee Rules of Civil Procedure were met and certified a nationwide class for litigation and trial purposes in the Order of National Class Certification. While such certification was and is contested by the defendants, they have agreed to class certification for settlement purposes, to promote a comprehensive, class wide resolution of polybutylene pipe litigation.
>
> 36) The numerosity, typicality, commonality, and adequacy requirements of Rule 23.01 of the Tennessee Rules of Civil Procedure are satisfied

> as to the Settlement Class in connection with the Settlement in this case.
>
> * * *
>
> 4.) Pursuant to Rule 23.01, Rule 23.02, and Rule 23.03 of the Tennessee Rules of Civil Procedure, the Court confirms the certification of the Settlement Class provided in the Preliminary Approval Order and maintains such certification for purposes of final approval of the settlement.

125. The above conclusory assertions in the preliminary and final orders do not satisfy *Amchem's* requirements. The *Cox* court never evaluated the adequacy of the named Plaintiffs to represent the diverse interests in the class, did not identify and compare the common and uncommon questions, and relied purely on conclusory recitals. The failure to use subclasses resulted in inadequate representation and created conflicts of interest among class representatives.

126. In *Cox* and *Spencer*, like *Amchem*, the only common and predominant issues were shared exposure and plaintiffs' interest in the settlement. The *Cox* and *Spencer* final orders reflect that each of these courts relied upon the wrong factors in approving the classes. The primary defect of the *Cox* and *Spencer* classes is the failure of the parties to account for the great differences in circumstances among the class members.

127. The *Cox* and *Spencer* courts failed to account for the conflict between current and future claimants. The *Cox* and *Spencer* orders purport to settle the claims of plaintiffs that may not yet know that their units contain polybutylene, or those who have no apparent damage. These plaintiffs had their claims compromised without

their knowledge. The *Cox* and *Spencer* Plaintiffs, who knew they had problems with polybutylene plumbing systems, prejudiced future claimants by creating limitation periods within the settlement agreement which the defendants will use to bar future claims.

128. For due process to exist as to absent class members, the record must reflect that counsel zealously represented the class members at all times. An adequate representative, vigorously prosecuting an action, without conflict, is the cornerstone of adequate representation. Class representatives in *Cox* and *Spencer* failed to properly value the class claims, either individually or on a class wide basis.

129. Due process requires that absent class members receive notice of the proceedings, and be given a meaningful opportunity to participate and to opt out. If plaintiffs did not receive timely notice of the *Cox* and *Spencer* proceeding, they did not have the opportunity to litigate whether they should be subject to the jurisdiction of the Tennessee and Alabama state courts. WHEREFORE plaintiffs request that the Polybutylene Group, and each and all members thereof, be preliminarily and permanently enjoined from directly or indirectly invoking Cox and Spencer to bar the Plaintiff and other members of the Class from asserting their rights to recover damages caused by the polybutylene system.

SEVENTH CLAIM FOR RELIEF – CONSPIRACY

130. The allegations of paragraphs 1 through 129 are incorporated herein by reference as if fully set forth.

131. Defendants at all relevant times knew that the polybutylene system was not suitable for potable water and would accordingly fail, necessitating repair or replacement and causing damage to structures and their contents, resulting in loss of use and enjoyment thereof and diminution in the value thereof.

132. Notwithstanding said knowledge, defendants combined together for the purpose of promoting the use of the polybutylene plumbing system for potable water supply site-built structures, suppressing information as to the unsuitability of the polybutylene system, and asserting positive claims as to polybutylene systems that they knew were false.

133. In furtherance of the conspiracy, the defendants undertook a course of tortious conduct by promulgating fraudulent misrepresentations concerning the polybutylene system, for example:

(a) Defendants failed to disclose material facts about the performance and life expectancy of the polybutylene system, and affirmatively misrepresented the life expectancy and performance characteristics of the polybutylene system;

(b) Defendants introduced the PB system into the stream of commerce by materially misrepresenting that it was suitable for its foreseeable use when defendants knew in fact it was not safe and suitable and did not meet reasonable consumer expectations;

(c) Defendants fraudulently failed to disclose information concerning the polybutylene system which was known at the time of the transactions, and such failure to

disclose was intended to induce consumers into a transaction in which the consumers would not have entered had the information been disclosed;

(d) Defendants fraudulently represented that the polybutylene system was of a particular standard, quality or grade, when in fact, it was another; and:

(e) Defendants fraudulently represented that the PB system had sponsorship, approval, characteristics, uses and benefits that it did not have.

EIGHTH CLAIM FOR RELIEF – STRICT LIABILITY

134. The Plaintiffs reallege paragraphs 1 through 133.

135. The Polybutylene Group designed, manufactured, assembled and sold, or otherwise introduced into the stream of commerce materials used in components of the system, components of the system, or the polybutylene system as a whole.

136. The PB system, its components, or materials used in components of the system reached ultimate consumers, such as the Plaintiffs, in substantially the same condition in which the polybutylene Group introduced them into the stream of commerce.

137. By introducing materials, components or the polybutylene system into the stream of commerce, the Defendants misrepresented that these items or the system were safe and suitable for its foreseeable use.

138. The Polybutylene Group made these material misrepresentations or omissions at the same time they promoted the alleged advantages and suitability of their

materials, components and the polybutylene system. Thus, the Polybutylene Group knowingly concealed the problems and defects of the polybutylene system.

139. The PB system was utilized in potable water plumbing systems in a manner intended and reasonably foreseeable by the Polybutylene Group.

140. The PB system was inherently defective and was a producing cause of Plaintiffs' damages.

141. Thus, the Polybutylene Group is strictly liable for damages herein, under §402A, Restatement of Torts, 2nd, as adopted by the Supreme Court of Texas.

NINTH CLAIM FOR RELIEF – NEGLIGENCE

142. The Plaintiffs reallege paragraphs 1 through 141.

143. The Polybutylene Group owed a duty to consumers, including the Plaintiffs and the Class, to adequately inspect and test the PB system and give adequate warnings regarding limitations on the use of the PB system.

144. The Polybutylene Group further owed a duty to exercise reasonable care in the design and manufacture of consumer products to ensure such were suitable for the reasonably foreseeable end-uses by consumers.

145. During the course of promoting and marketing the PB system, the Polybutylene Group negligently made material misrepresentations and omissions that the PB system, its components, and materials were suitable for potable water plumbing and had a long service life.

146. The Polybutylene Group breached their duty to adequately inspect and test the PB system, and further breached their duty of reasonable care to ensure the polybutylene system, its components, and materials were suitable for the foreseeable, intended uses by consumers.

147. The Polybutylene Group negligently omitted material information they possessed concerning the inherent defects of the PB system, and its short service life.

148. The Polybutylene Group members intended or reasonably could have foreseen or expected that their misrepresentations would be relied upon, and they were in fact relied upon, by customers, code bodies, trade associations, governmental entities, suppliers, the public at large, the Plaintiffs, and the other Class members.

149. As a direct and proximate result of the Polybutylene Group's negligence, the PB system was used in the structures of the Plaintiffs and the other Class members.

150. The Polybutylene Group's actions were either intentional or were performed with knowing disregard for the truth, or reckless indifference to the rights of the Plaintiffs and the other Class members.

151. As a direct and proximate result of the Polybutylene Group's negligent acts, the Plaintiffs and the other Class members have sustained compensable damages.

TENTH CLAIM OF RELIEF – BREACH OF IMPLIED WARRANTIES

152. The Plaintiffs reallege paragraphs 1 through 151.

153. The Polybutylene Group held themselves out to the general public as having knowledge and skills particular to the business of furnishing products or materials used in manufacturing components suitable for potable water plumbing systems.

154. The Polybutylene Group impliedly warranted and represented that the PB system was merchantable and reasonably fit for the ordinary purposes for which it was intended.

155. The Polybutylene Group breached this implied warranty because the PB system is not, and has never been, merchantable or reasonably fit for ordinary use; instead it is inherently defective.

156. The PB system was specifically engineered, designed manufactured, sold, and intended for water supply plumbing use, and the Polybutylene Group advertised and marketed the PB system for such purposes.

157. The Polybutylene Group knew that the Plaintiffs and the class were relying on the Polybutylene Group's skill and judgment to select and furnish materials and plumbing systems suitable for their intended purpose.

158. The Polybutylene Group knew or should have known that the PB system would be installed in the structures owned be [sic] the Plaintiffs and the Class.

159. The Plaintiffs and the Class relied on the Polybutylene Group's skill, judgment, and implied warranty that the goods were fit for potable water plumbing systems, yet the PB system was not suitable for this intended use.

160. As a direct result of the Polybutylene Group's breach of implied warranties of merchantability and fairness, the Plaintiffs and the other Class members have sustained compensable damages.

161. Plaintiffs demand trial by jury. WHEREFORE, premises considered, Plaintiffs pray that Defendants be cited to appear and answer herein, and that upon final hearing hereof, Plaintiffs recover:

1) Judgment against Defendants for money damages to reasonably compensate Plaintiff and all class and subclass members;

2) Pre-judgment interest at the highest legal rate;

3) Post-judgment interest at the highest legal rate per annum from the date of judgment until paid;

4) Costs of suit;

5) Reasonable and necessary attorney's fees; and,

6) Such other and further relief, both at law and at equity, as Plaintiffs may be entitled to receive.

Respectfully submitted,

/s/ Mitchell A. Toups
w/permission

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been forwarded to all counsel of record by regular or certified mail, return receipt requested, on this 6th day of October, 2000.

/s/ Mitchell A. Toups
w/permission
MITCHELL A. TOUPS